TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 44

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, SECOND JUDICIAL DISTRICT, STATE OF TEXAS

PETITION FOR CERTIORARI FILED MARCH 31, 1941
CERTIORARI GRANTED MAY 12, 1941

SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS ET AL.

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INDEX

	Original	Print
Record from District Court of Gregg County [omitted in printing]	1	
Caption [omitted in printing]	5	1
Exchange of Benches [omitted in printing]	6	
Plaintiff's Original Petition	7	1
Order Appointing Receiver	12	4
Intervention of R. P. Ash	14	5
Plea in Intervention of State of Texas	20	9
Receiver's Report for 1933 [omitted in printing]	24	
Proof of Claim [omitted in printing]	28	
Proof of Claim for Taxes Due the United States [omitted in printing]	34	
Proof of Claim for Taxes Due the United States	36	12
Annual Report of Receiver for 1934 [omitted in printing]	45	
Order Approving Receiver's Report [omitted in printing]	49	
Application of Receiver to Sell Property Belonging to Estate [omitted in printing]	50	
Order Authorizing Sale of Property [omitted in printing]	52	
Application of Receiver to Sell Oil [omitted in printing]	53	
Order for Receiver to Sell Oil [omitted in printing]	55	
Copy of Conveyance by Receiver [omitted in printing]	56	
Final Report of Receiver [omitted in printing]	62	

	Original	Print
Record from District Court of Gregg County [omitted] in printing—Continued.		
Order Approving Final Report and Discharging Receiver	66	15
Plea of Intervention of Howard Dailey	67	15
First Amended Original Plea of Intervention of Howard Dailey	71	17
Answer of Intervenor, The United States, to Plea of Intervention Filed by Howard Dailey	82	24
Answer of Intervenor, The United States, to Petition of Intervention of R. P. Ash	87	27
Answer of Intervenor, United States, to Petition of Plaintiff	91	29
Answer of Intervenor, State of Texas, to Petition of Plaintiff	95	31
Answer of Intervenor, State of Texas, to Intervention of R. P. Ash	96	32
Answer of Intervenor, State of Texas, to Intervention of Howard Dailey	98	33
Order Extending Term of Court [omitted in printing]	100	
Judgment of District Court	101	34
Findings of Fact and Conclusions of Law	108	39
Bill of Costs [omitted in printing]	112	
Certificate of Clerk [omitted in printing]	113	41
Statement of facts and proceedings (Testimony and Exhibits) [omitted in printing]	114	
Proceedings in Court of Civil Appeals for the Second Supreme Judicial District of Texas	272	41
Certified Questions	272	41
Tentative Opinion of Court of Civil Appeals	283	47
Order Certifying Questions to Supreme Court of Texas	297	55
Motion of the United States to Amend Certified Questions	298	55
Order Amending Certified Questions	301	57
Supplement to Certified Questions	302	57
Opinion of Supreme Court of Texas on Certified Questions	304	58
Judgment of Supreme Court of Texas on Certified Questions	315	65
Judgment of Court of Civil Appeals	317	65
Opinion of Court of Civil Appeals	318	66
Motion for Rehearing in Behalf of United States of America	328	72
Order Overruling Motion for Rehearing	330	72
Motion in Behalf of the United States to Stay Issuance of Mandate [omitted in printing]	331	
Order Staying Issuance of Mandate [omitted in printing]	334	
Proceedings in Supreme Court of Texas [omitted in printing]	335	73
Application for Writ of Error on Behalf of the United States of America	338	73
Order Refusing Application for Writ of Error	350	82

	Original	Print
Motion for Rehearing on Behalf of United States of America	351	82
Order Overruling Motion for Rehearing	353	83
Clerk's certificate [omitted in printing]	354	83
Motion in Court of Civil Appeals to Stay Issuance of Mandate [omitted in printing]	355	
Order of Court of Civil Appeals Dated November 15, 1940, Staying Issuance of Mandate [omitted in printing]	358	
Certificate of Clerk of Court of Civil Appeals [omitted in printing]	359	
Order Granting Extension of Time To File Petition for Writ of Certiorari	361	84
Stipulation as to Printing of the Record	362	84
Order allowing certiorari		35

5 [Caption omitted.]

7 In the 124th District Court of Gregg County, Texas

No. 2394–B

M. R. INGRAM

vs.

W. L. NIX ET AL.

Plaintiff's original petition

Filed Nov. 20, 1933

To the Honorable Judge of Said Court:

Now comes M. R. Ingram, hereinafter styled plaintiff, complaining of W. L. Nix and Heartfield Refining Company, Inc., hereinafter styled defendants, and for cause of action allege and stand ready to verify the following:

I

Plaintiff resides in Gregg County, Texas.

Defendant, W. L. Nix, resides in Gregg County, Texas, and operates his refining business under the trade name of Texas Refinery. Heartfield Refining Company, Inc., is a corporation organized under and pursuant to the laws of the State of Texas, having maintained its office and principal place of business in Kilgore, Gregg County, Texas.

II

On the 11th day of May 1933 defendant, Heartfield Refining Company, Inc., acting by and through its President, C. A. Heartfield, executed and delivered to plaintiff its promissory note, bearing date on such day and year, thereby promised plaintiff to pay him, or his order, on demand after date, the sum of Eleven Hundred Three and 49/100 ($1,103.49) Dollars, with 8% interest from date until paid, and 10% attorneys' fee upon principal and

8 interest if placed in the hands of an attorney for collection or suit should be brought thereon, after maturity, which said note was secured by a chattel mortgage upon the following described property, to wit: Six 250-barrel run-down tanks, one 1,000-barrel storage tank, which property was situated at that time on the site of the Heartfield Refining Company, Inc., on the outskirts of Kilgore, Gregg County, Texas.

III

Plaintiff, being from such date to the present date the legal owner and holder of such note, on the 15th day of November 1933 made demand of defendants to pay the same, and defendants, refusing, placed such note after demand in the hands of the undersigned attorneys for collection, agreeing with them to pay them the said amount of attorneys' fees for his services in connection with such note, which is a reasonable amount therefor.

IV

Though repeated demands have been made by plaintiff upon defendants to pay such note, interest, and attorneys' fees, the defendants have failed and refused, and still fail and refuse, to pay the same, or any part thereof, to the plaintiff's damage in the sum of Fifteen Hundred and No/100 ($1,500.00) Dollars.

V

Plaintiff says that the above-mentioned tanks were erected for and used by defendant, Heartfield Refining Company, Inc., in the operation of its oil-refining plant near Kilgore, Gregg County, Texas.

VI

Plaintiff further says that after the execution of the afore-mentioned note and chattel mortgage, the defendant, Heartfield Refining Company, Inc., sold and delivered the above-described tanks, together with said refinery to W. L. Nix, and in said bill of sale, and as a part of the consideration therefor, the said W. L. Nix assumed and agreed to pay all outstanding debts then owed by Heartfield Refining Company, Inc., which debts included the aforementioned note, whereby the said W. L. Nix became bound, obligated, and promised to pay the said note and to discharge the said chattel mortgage, according to their face tenor and effect. Since that time, the said W. L. Nix has been in possession of said tanks and said refinery, using and operating said refinery under the trade name of Texas Refinery, and has exercised possession and dominion over said tanks.

VII

Plaintiff says that he has made demand of W. L. Nix for payment of said note, and the said W. L. Nix refusing, he then made demand for delivery and possession of the security therefor, to wit,

the afore-mentioned tanks, and the said W. L. Nix has failed and refused, and still fails and refuses to pay said indebtedness and further fails and refuses to deliver up to plaintiff the security therefor, to wit, the afore-mentioned tanks.

VIII

Plaintiff further says that the said W. L. Nix is wholly insolvent and unable to pay said account, and owns no other property or assets in the State of Texas subject to execution, save and except the afore-mentioned refinery, which plaintiff alleges is heavily encumbered with liens and debts which constitute prior liens and encumbrances and is subjected to the satisfaction of liens which are prior to that of plaintiff, that the total assets of the defendant, W. L. Nix, would be insufficient to satisfy them, and that the mortgaged property is in danger of being materially injured, and that the conditions of the mortgage have not been performed and the value of the property is insufficient to discharge the mortgage debt, and the value of the whole of said property used and operated as Texas Refinery is probably insufficient to discharge the liens which are prior to the mortgage of this plaintiff, and further says that said tanks, above described, are not used for a separate purpose, but the use thereof is made as a part of the use and operation of the said refinery as a unit.

IX

Plaintiff further says that the said W. L. Nix is insolvent and unable to meet his obligations as they mature.

X

Plaintiff would further show unto the Court that an extreme emergency exists for the immediate appointment of a receiver herein without notice in order that the assets securing the plaintiff's debt be not lost but preserved, and that unless said receiver is appointed, plaintiff fears and alleges that the assets of the defendants will be dissipated, injured, and lost to plaintiff.

Wherefore, premises considered, plaintiff prays that each of the defendants be cited to appear and answer herein and, on final hearing hereof, he have judgment for his debt in the sum of Eleven Hundred Three and 49/100 ($1,103.49) Dollars, with interest thereon from date thereof until date of judgment at the rate of 8% per annum, for 10% attorneys' fees on the whole thereof, together with interest on said judgment from date

thereof until paid at the rate of 8% per annum, for costs of suit, and that his chattel mortgage be established and foreclosed, and that he have his order of sale and writ of possession. Pending such time plaintiff prays that this Court forthwith appoint some competent person as receiver over the whole of the property of defendant, W. L. Nix, now being operated and conducted under the trade name of Texas Refinery, giving and granting to such receiver the appropriate power and authority to operate or lease same as the court may deem expedient and subject to the further orders of this Court.

LEE, PORTER & LATHAM,
Attorneys for Plaintiff.

[*Duly sworn to by M. R. Ingram; jurat omitted in printing.*]

12 In District Court of Gregg County

[Title omitted.]

Order appointing receiver

Filed November 20, 1935

On this 20th day of November 1933, came on to be considered by the Court the application of M. R. Ingram for the appointment of a receiver over the property of W. L. Nix, which is known as Texas Refinery, situated at Kilgore, Gregg County, Texas, and the plaintiff appearing by counsel and the defendant having appeared, and plaintiff having announced ready on his application; the court having read the verified oath of complaint and hearing the statement and admissions in open court, is of the opinion and finds that the same presents the proper case authorizing the appointment of a receiver, ex parte, and for granting the relief shown in this order.

It appearing to the court that J. G. Strong is duly qualified under the law; he is hereby appointed Receiver over all and singular the property of the defendant, W. L. Nix, known as Texas Refinery, including all and singular the real and personal property used in connection therewith, and that he take immediate possession and charge over all the properties, assets, books of account, contracts and documents of Texas Refinery, with full authority to carry on and conduct the business of such company, and to that end receive rents, accounts, compound for, compromise demands and bring suits, and in general to manage the property, or if in the opinion of the receiver, he shall be and is hereby

authorized to lease said plant upon the best terms and con-
13 ditions available, subject to the approval of the court; that he be authorized to make purchases of crude petroleum, make sales of the refined productions, to collect therefor and to hold the proceeds arising from such operation subject to the orders of this court, except so much thereof as may be necessary to conduct such operations.

That the said W. L. Nix, his agents and employees, are required and commanded forthwith to surrender to such receiver on demand, all books of account, minute books, records, and property of any and every description belonging or pertaining to the business of Texas Refinery to be kept in the custody of such receiver subject to the order of this court.

That such receiver before entering on his duty shall execute a bond in the sum of $2,500.00, according to law, to be approved by this court, and shall return and file with the court, within twenty (20) days from this date a full and complete inventory of all the property of the defendant, operated as Texas Refinery over which he is hereby ordered to take charge and control as receiver, together with a list of the assets and liabilities.

That the said W. L. Nix, his agents and employees, are hereby enjoined from in any way interfering or intermeddling with the property hereby directed to be turned over to said receiver, or from hindering or molesting him in any way while acting as such receiver, and from disposing of said property, except to transfer and turn same over to such receiver subject to the orders of this court, and hearing on a contest in any hereof is set for Nov. 25, 1933, at 9:00 A. M.

WILL C. HURST,
Judge of the 124th District Court
of Gregg County, Texas.

14 In District Court of Gregg County

[Title omitted.]

Intervention of R. P. Ash

Filed November 21, 1933

Now comes R. P. Ash, intervener in the above-entitled and numbered cause, and, with leave of court first had and obtained, files this his petition in intervention, and thereby, complaining of M. R. Ingram, W. L. Nix and Heartfield Refining Company, Inc., parties to the above-entitled and numbered cause and would respectfully show:

I

That heretofore, to wit, on the 20th day of November 1933, the above-entitled and numbered suit was filed wherein M. R. Ingram is plaintiff, and W. L. Nix and Heartfield Refining Company, Inc., are defendants, wherein the plaintiff has sued the defendants and is seeking a judgment against them for his debt in the sum of One Thousand One Hundred Three and 49/100 ($1,103.49) Dollars, together with interest thereon and attorneys fees and for costs of suit and for foreclosure of his chattel mortgage lien on certain property set out in his original petition on file herein and for the appointment of some competent person as Receiver over the whole of the property of the defendant, W. L. Nix, now being operated under the trade name of Texas Refinery; that pursuant to the filing of said petition and application for the appointment of a Receiver, this Honorable Court did on the 20th day of November 1933, appoint J. G. Strong, Receiver, setting his bond at the sum of Twenty-five hundred ($2,500.00) Dollars; that the said J. G. Strong has qualified as such Receiver and has entered into possession of the property of the said W. L. Nix, being operated and conducted under the trade name of Texas Refinery, at Kilgore, Texas.

II

That your intervener has an interest in the matter in controversy in the above-entitled and numbered cause and has a cause of action against the defendants, W. L. Nix and Heartfield Refining Company, Inc., in that heretofore, to wit, on or about April 27, 1933, the Heartfield Refining Company, Inc., made, executed, and delivered to R. W. Porter its certain promissory note in the sum of Seventeen Hundred Fifty and No 100 ($1,750.00) Dollars, payable in two equal installments of Eight Hundred Seventy-five and No 100 ($875.00) Dollars each, due respectively on June 1, 1933, and July 1, 1933, said note bearing interest from date at the rate of eight (8%) percent per annum and containing the usual ten (10%) percent attorney's fee clause; that thereafter, to wit, on August 26, 1933, the said R. W. Porter, the owner and holder of said above-described note, for valuable consideration, sold, transferred, and delivered same, together with all rights and liens securing it, to intervener who is now the owner and holder of said note and lien.

III

That said above described note in the sum of Seventeen Hundred Fifty and No 100 ($1,750.00) Dollars is secured by a chattel mortgage lien on the following described property, to wit:

All of the Refinery equipment and the leasehold estate owned by Heartfield Refining Company, situated on the 3-acre Heartfield Refining Company, Inc., site in the Mary Van Winkle Survey in Gregg County, Texas, save and except Six (6) 250
16 barrel run down tanks and one (1) 1,000 barrel crude storage tank located thereon, which said chattel mortgage was executed by the Heartfield Refining Company, Inc., acting by and through its President, C. A. Heartfield, on or about April 27, 1933, and filed for registration with the County Clerk of Gregg County, Texas, on the 6th day of May A. D. 1933, and duly registered by said County Clerk under File No. 1889; that chattel mortgage constitutes a valid, outstanding first and superior lien on the property described therein.

IV

That thereafter the defendant, W. L. Nix, purchased all of the refinery equipment of the Heartfield Refining Company, Inc., and, as a part of the consideration therefor, assumed and agreed to pay the above-described note held by your intervener, whereby the said W. L. Nix became bound, obligated, and promised to pay said note and to discharge said chattel mortgage lien according to their face, tenor, and effect

V

That your intervener has made demand for the payment of the above-described note and for the delivery to him of the equipment against which he holds the above-described chattel mortgage lien; that said defendants have wholly failed and refused and still fail and refuse to pay said note; or to deliver to your intervener the said refining equipment, to intervener's damage in the sum of Twenty-five Hundred and No/100 ($2,500.00) Dollars.

VI

Intervener would further show that on or about September 19,
1933, the defendant, W. L. Nix, for value received, made,
17 executed, and delivered to intervener his certain promissory note in the sum of Four Thousand Six Hundred Fifty-one and 86/100 ($4,651.86) Dollars, payable on demand and bearing interest at the rate of eight (8%) percent per annum from date, and containing the usual clause providing for the payment of an additional ten (10%) percent on both principal and interest as attorney's fees, if placed in the hands of an attorney for collection, or if collected by suit; that said indebtedness note is secured by a chattel mortgage lien on the following described property be-

longing to the defendant, W. L. Nix, doing business as the Texas Refinery, to wit:

1—1,500 bbl. capacity Pipe & Still	$788.14
Wood Cooling Tower	484.75
Laboratory—Building & Equipment	141.62
Pipe & Equipment in Water Well	157.35
2,000 bbl. capacity Bubble Tower	3,000.00
Bath House & Equipment	30.00
Office Equipment—Typewriter & Filing Cabinets	50.00
	4,651.86

Which said chattel mortgage was executed on September 19, 1933, and filed for Registration with the County Clerk of Gregg County, Texas, September 30, 1933, at 3 o'clock P. M., and duly registered by said County Clerk under File 5425, which said chattel mortgage is a valid, outstanding first and superior lien on the property described herein.

VII

That intervener is the owner and holder of the said above-described note in the sum of Four Thousand Six Hundred Fifty-one and 86/100 ($4,651.86) Dollars and said chattel
18 mortgage lien securing the same, and has made demand on the said W. L. Nix for the payment of said note or the delivery up to him of the property described in said chattel mortgage, but the said W. L. Nix has wholly failed and refused and still fails and refuses to pay said note, or to deliver to intervener the said above-described property, to intervener's damage in the sum of Six Thousand and No/100 ($6,000.00) Dollars.

VIII

That intervener has been compelled to place said notes in the hands of his attorney, whose name is undersigned, and has agreed to pay him the ten (10%) percent attorney's fee provided for in said above-described notes, which is a reasonable fee.

IX

That the property described in each of the foregoing chattel mortgages owned by intervener is a part of the property and equipment taken over by your Receiver herein as the property of W. L. Nix, doing business as the Texas Refinery, and some of it is attached to the property described in the petition of the said M. R. Ingram; that the property described in the said petition and that encumbered by intervener's liens comprise the entire business unit operated as the Texas Refinery.

X

That intervener's chattel-mortgage liens as above described and set out are first and superior liens on the property described in said chattel mortgages and are of insufficient value to discharge
19 in full the indebtedness due intervener and represented by the notes above described.

Wherefore, premises considered, intervener prays that he be allowed to intervene in said suit entitled M. R. Ingram vs. W. L. Nix et al., No. 2394-B on the docket of this court; that he have judgment against the defendant, W. L. Nix, for the amount of his debt, interest, attorney's fees, and costs of suit, and for the foreclosure of his chattel-mortgage lien on the property above described, and that said judgment have priority of payment over any judgment rendered in said cause insofar as the application of the proceeds from the sale of the above-described property to which intervener's lien attaches is concerned; that your Receiver heretofore appointed be authorized to discharge intervener's debt and lien in accordance with the priority prayed for in this petition; that in case the Receiver herein appointed is allowed to operate or lease said refinery pending a final hearing in this cause said Receiver be ordered to pay to intervener ratably the proceeds of such operation or lease to be applied on the indebtedness and notes due this intervener, and for such other and further relief at law or in equity, special and general, to which intervener may show himself entitled.

CAMPBELL & LEAK
Attorney for Intervener.

20 In District Court of Gregg County

[Title omitted.]

Plea in Intervention of State of Texas

Filed December 16, 1933

To the Honorable Judge of Said Court:

Now comes the State of Texas, represented herein by and through its duly elected, qualified, and acting Attorney General, James V. Allred, at the special instance and request of the Comptroller of Public Accounts of the State of Texas, George H. Sheppard, and leave of the Court having first been had and obtained, files this, its plea in intervention, complaining of W. L. Nix, defendant in the above entitled and numbered cause, and respectfully shows unto the Court:

I

That the defendant, W. L. Nix, while trading and doing business as the Texas Refinery, was engaged in the business of wholesale dealer and distributor of motor fuel, as defined by the Acts of the 41st Legislature, second called session, Chapter 88, and as amended at the regular session of the 42nd Legislature, Chapter 98 of said Acts, and by the Acts of the 43rd Legislature, Chapter 44, Page 75; that as such wholesale dealer and distributor of gasoline and motor fuel and selling gasoline and motor fuel at wholesale as defined in said Act in intrastate commerce in this State, said defendant became bound and liable to pay to the State of Texas on each gallon of gasoline distributed, sold, or used, a sum equal to four cents per gallon on all gasoline and motor fuel so sold, distributed, or used during the time that the
21 said defendant was operated as a distributor of gasoline and motor fuels in this State, and while trading and doing business under the firm name of the Texas Refinery.

II

That said tax was due and payable at the office of the Comptroller on or before the 20th day of each month, based on sales made during the calendar month next preceding; that said defendant, W. L. Nix, doing business as the Texas Refinery, was required on or before the 20th day of each month to make and deliver to the Comptroller of Public Accounts a sworn statement, giving the exact number of gallons of gasoline and motor fuel sold, used, or distributed by said defendant at wholesale in intrastate commerce in this State during the next preceding month and was also required to accompany said report with a remittance in a sum equivalent to four cents per gallon on gasoline and motor fuel, sold, used, or distributed at wholesale, and for failure to pay such tax on the due date; said defendant became bound and liable to pay to the State of Texas penalty of ten percent on the amount of the tax due, together with interest thereon at the rate of eight percent per annum from said due date until paid.

III

Your intervener would further show unto the Court that the said defendant sold, used, and distributed at wholesale as defined by law 721,754 net gallons of gasoline on which said defendant became bound and liable to pay to the State of Texas an occupation tax, a sum equal to four cents per gallon on each gallon so sold, amounting to the sum of $28,870.16; that said defendant

wholly failed and refused to pay said tax on its due date, and by reason thereof became bound and liable to pay to the State of Texas an additional sum of ten percent on the amount of
22 said tax as penalty for such failure to pay on said due date, together with ten percent interest on the amount of taxes and penalties from due date until paid.

IV

That although often requested, defendant has wholly failed and refused, and still fails and refuses, to pay any of said amount, which amounts aggregate the total sum of $30,796.71; that said total amount is still outstanding, due, and unpaid.

V

That by the provisions of said law this intervener has a first superior and preferred lien upon all of the property of said defendant, W. L. Nix, trading and doing business under the firm name of Texas Refinery, used in its business as a distributor of gasoline, for all delinquent taxes, fines, penalties, and interests and costs due by said defendant to the State of Texas; said lien is the first and prior lien to all other existing liens and on all the property of said defendant which was devoted to or used in his business as a distributor, and which property includes all refinery properties, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, and any and all other properties devoted to such use, and each tract of land on which such refinery, blending plant, tanks, or other properties are located or which is used in carrying on such business; that said defendant has been by this Honorable Court placed in the hands of a receiver; that said receiver will file in this cause an inventory and look over all the property used by said defendant in his business as a distributor of gasoline, and your intervener alleges that it has a
23 lien on all of such property securing the payment of the hereinabove alleged delinquent gasoline and motor fuel occupation taxes.

Wherefore, premises considered, intervenor prays the Court that this, its plea in intervention, be ordered filed herein and that on final hearing hereof it have its judgment establishing its debt against W. L. Nix, and that its lien against all the hereinbefore mentioned property be adjudged to be a first, prior, and superior lien, and that the same be foreclosed; that all of said property be ordered sold and the proceeds of such sale applied on such debt, principal, interest, costs of suit, and for such other and further

relief, general and special, legal and equitable, to which it may show itself justly entitled.

JAMES V. ALLRED.
James V. Allred,
Attorney General of Texas.
WILLIS E. GRESHAM.
Willis E. Gresham,
Assistant Attorney General.
R. G. WATERS.
R. G. Waters,
Assistant Attorney General.

36 In District Court of Gregg County

Proof of claim for taxes due the United States

Filed July 13, 1935

ATC: SLM: MFE. JULY 10, 1935.

IN RE M. R. INGRAM

vs.

W. L. NIX ET AL.

No. 2394–B In Receivership

CLERK OF THE 124TH JUDICIAL DISTRICT COURT
OF GREGG COUNTY,
Longview, Texas.

SIR: On or about December 30, 1933, and January 12, 1934, there were forwarded to you Government proofs of claim in the respective amounts of $20,907.61 and $600.50 for filing in the above-styled case. These claims represent taxes due the United States by Texas Refinery, Kilgore, Texas, for the months of May to November 1933, inclusive, as imposed by Section 617 (a) of the Revenue Act of 1932 on the sale of gasoline.

There is attached hereto an amended proof of claim in the amount of $19,914.81 for filing in the above-styled case. This claim represents gasoline taxes for the period as set forth above due the United States by the Texas Refinery, W. L. Nix, Owner, of Kilgore, Texas, and is a consolidated of the two claims formerly filed. The new claim represents the present indebtedness of this taxpayer as reflected from the records of this office and is filed as an amendment to rather than a replacement of the claims formerly filed and without prejudice to priorities of time established heretofore.

A copy of the proof of claim is also transmitted with the request that you acknowledge receipt of the original thereof by signing on the space provided therefor at the foot of the
37 copy.

Respectfully,

(Signed) W. A. THOMAS,
Collector.

Enclosure.

Proof of Claim for Taxes Due United States of America

In the District Court of Gregg County, 124th Judicial District, Longview, Texas

No. 2394–B—In Receivership

In matter of M. R. INGRAM *vs.* W. L. NIX ET AL.

Comes now W. A. Thomas, Collector of Internal Revenue for the Second District of Texas, at Dallas, a duly authorized agent for the United States in this behalf, and states that the Texas Refinery, W. L. Nix, Owner, of Kilgore, Texas, is justly and truly indebted to the United States of America for internal-revenue taxes as follows:

Internal Revenue Taxes as imposed by Section 617 (a) of the Revenue Act of 1932, as amended, on the sale of gasoline by the producer or importer thereof, legally due and owing, as follows:

May 1933:	
Tax	$480.40
Interest	31.71
	512.11

Plus interest at the rate of 6% per annum from January 6, 1934, to date of payment.

38 June 1933:

Tax	$1,036.11
25% penalty	259.03
Interest	43.17
	1,338.31

Plus interest at the rate of 6% per annum from January 6, 1934, to date of payment.

July 1933:	
Tax	949.81
25% penalty	237.45
Interest	30.08
	1,217.34

Plus interest at the rate of 6% per annum from January 6, 1934, to date of payment.

August 1933:		
Tax		$2,488.88
Interest		53.93
		2,542.81
Plus interest at the rate of 6% per annum from January 6, 1934, to date of payment.		
September 1933:		
Tax		3,014.56
Interest		70.34
		3,084.90
Plus interest at the rate of 6% per annum from October 31, 1933, to date of payment.		
October and November 1933:		
Tax—October $6,717.87		
November 4,397.25		11,115.12
Interest		104.22
		11,219.34
Plus interest at the rate of 6% per annum from December 31, 1933, to date of payment.		
Total amount due excluding unassessed accrued interest		19,914.81

That no part of said taxes, interest, or penalties has been paid but the same are now due and payable at the office of said Collector, and no security therefor is held by the United States nor are there any off-sets or counterclaims to same.

That this claim is entitled to priority in payment and attention is called to section 64 (a) of the Bankruptcy Act and section 3466 of Revised Statutes of the United States, which direct priority in payment of taxes due the United States over other claims, and to the provisions of section 3467, Revised Statutes of the United States, as amended by section 518 of Revenue Act of 1934 imposing personal liability upon an executor, administrator, assignee, trustee or other person who, in paying debts of the person or estate for whom or for which he acts, fails to observe the priority in payment prescribed by statute in favor of the United States.

Dated at Dallas, Texas, this the 8th day of July A. D. 1935.

W. A. THOMAS,
Collector of Internal Revenue,
Second District of Texas.
By S. L. MAYO,
Deputy Collector.

[Duly sworn to by S. L. Mayo; jurat omitted in printing.]

66 In the District Court of Gregg County, in Chambers

[Title omitted.]

Order approving final report and discharging receiver

Filed November 5, 1935

On this the 5th day of November, A. D. 1935, came on to be considered the final report and accounting of J. G. Strong, Receiver, heretofore appointed in the above-entitled and numbered cause, and it appearing to the Court that said report has been on file for ten (10) full days and that proper notice of said filing has been given to all interested parties; and, the Court having carefully examined the same and finding that all of the assets of said Estate have been converted into cash, amounting to the sum of $7,516.92, which said sum has been paid into the registry of this Court, and that there is no further necessity for a continuation of said Receivership, is of the opinion that said Receivership should be closed and the Receiver should be discharged from any further duties and liabilities, and that the sureties on his official bond, as Receiver, should also be discharged;

It is, therefore, ordered and decreed by the Court that said final report and accounting of said Receiver be, and the same is hereby, in all things, approved and ordered filed among the papers of this cause and that the said J. G. Strong, as Receiver, be, and he is hereby, discharged from all further duties and liabilities of said Receivership; and, it further is ordered that the sureties on the official bond of such Receiver be, and they are hereby, discharged from any and all liabilities under and by virtue of said bond.

WILL C. HURST.
Judge of the 124th Judicial District of Texas.

67 In District Court of Gregg County

[Title omitted.]

Plea of intervention of Howard Dailey

Filed Jan. 5, 1938

To the Honorable CLARENCE E. MCGAW, *Judge of Said Court:*

Now comes Howard Dailey, hereinafter called intervenor, and leave of the Court having been first had and obtained, files this,

his plea of intervention in this cause, and for cause of action, would show to the Court:

1. That heretofore, to wit, on the 20th day of November, A. D. 1933, M. R. Ingram brought this suit against W. L. Nix in person and against W. L. Nix Trading as Texas Refinery, and upon the said M. R. Ingram's petition, of even date with the filing of said suit, this Honorable Court appointed J. G. Strong receiver for said Texas Refinery, who immediately qualified and took charge of said Texas Refinery, and same was operated by said receiver until on or about November 5th, A. D. 1935.

2. That on or about said date of November 5th, 1935, pursuant to an order theretofore issued out of this Court, an order of sale was approved for the sale of said Texas Refinery, which said properties were sold for, and brought, approximately the sum of $7,516.92; that upon said sale, and the winding up of the affairs of the receivership estate, the said receiver paid into this Court on November 5th, 1935, the said sum of $7,516.92, and allowed said receiver a fee of $50.00 out of this sum, in addition to fees theretofore paid to him, leaving a balance of $7,466.92, which said sum is still in the registry of this Court.

68 3. That during the progress of this litigation, R. P. Ash filed his plea of intervention herein, alleging that the receivership estate owed him approximately the sum of $6,700.00, for which he had a mortgage of record against said Texas Refinery and its properties and assets.

4. That on or about December 21st, 1936, the said W. L. Nix, for valuable consideration, by his assignment in writing, sold, assigned, and conveyed to intervenor all his rights, titles, and interests in and to said sum of $7,466.92, now in the registry of this Court, and intervenor thereby acquired whatever interest then held and owned by the said W. L. Nix.

5. That on or about 12th day of July, A. D. 1937, by his assignment in writing, the said R. P. Ash sold, assigned, and conveyed unto intervenor all his rights, titles, and interests in and to said sum of money so held in the registry of this Court, and as a part of said assignment, subrogated and passed to intervenor all rights, of prior claim, mortgage, and liens, and by reason thereof, intervenor is now the owner and holder of all interests so held by the said R. P. Ash.

6. That subsequent to the filing of this suit, and before the filing of this plea of intervention, and before any of said sums of money so paid into the registry of this Court, M. R. Ingram formed a partnership with J. R. Stegall, under the firm

69 name of Ingram & Stegall, and all interests in this suit, together with all interests in the money so paid into the registry of this Court as aforesaid, was transferred to said partner-

ship of Ingram & Stegall, and on September 13th, 1937, by telegraphic assignment, said Ingram & Stegall sold, assigned, and conveyed unto intervenor all their rights, titles, and interests in and to said sum of money so held in the registry of this Court, and by reason of said assignment, intervenor became the owner of all rights, titles, and interests of the M. R. Ingram claim in said sum of money so held in the registry of this Court.

7. Intervenor says that if other claims have been filed herein, or intervenors appeared, that such claims and interventions are fictitious, without merit, and that, in addition to the claims acquired by intervenor, as above set out, now owned and held by him, that there are no further claims, liabilities, or valid claimants to said sum, with the exception of what Court Costs that have or will accrue herein, and says that he is entitled to said sum of money, to wit, $7,466.92, less Court Costs.

Wherefore, premises considered, intervenor prays that he be allowed to intervene in this cause, and that he have an order from this Honorable Court directing the District Clerk to so pay to the said intervenor said sum of $7,466.92, less Court Costs accrued and to accrue herein, and for such other and further relief,
70 special and general, both in law and in equity, to which he may show himself justly entitled.

HOWARD DAILEY, *Intervenor.*

[*Duly sworn to by Howard Dailey; jurat omitted in printing.*]

IN CHAMBERS, *January 5th, 1938.*

The foregoing petition in intervention having been presented to me, same is ordered filed and hearing on said intervention is set for Friday, January 14th, 1938, at 9:00 A. M.

It is further ordered that notice of said Hearing be given to all interested parties.

CLARENCE E. McGAW.
Judge of the 124th District Court.

71 In District Court of Gregg County

[Title omitted.]

First amended original plea of intervention of Howard Dailey

Filed Jan. 21, 1938

To the Honorable Judge of Said Court:

Now comes Howard Dailey, and with leave of the Court first had and obtained, files this, his First Amended Original Plea of Intervention, and, complaining of plaintiff, M. R. Ingram,

defendant, W. L. Nix, and all other parties herein, whether plaintiffs, defendants, or intervenors, and respectfully shows the Court as follows, to wit:

That the intervenor, Howard Dailey, is a resident of Dallas County, Texas, and the residence of the other parties herein is as alleged in their pleadings herein.

That on the 19th day of September 1933, the defendant, W. L. Nix, doing business as Texas Refinery, executed and delivered to R. P. Ash his promissory note, bearing date on such day and year, and thereby promised R. P. Ash to pay him, on demand, the sum of $4,651.86, with 6% interest per annum thereon from said date, and 10% attorneys fees upon principal and interest if placed in the hands of an attorney for collection, or suit should be brought thereon after maturity. Your intervenor does not know where said note is, and intervenor alleges that he does not how have nor has he ever had possession of said note, but is

72 prepared to and will offer secondary evidence of the contents thereof and of the execution and delivery of same as in this petition set out and alleged.

Upon the 19th day of September 1933, the defendant, W. L. Nix, doing business as Texas Refinery, executed and delivered to the said R. P. Ash his chattel mortgage whereby he granted, sold, and conveyed to R. P. Ash the following described property to secure the payment of the above described note, to wit:

1 1,500 barrel-capacity pipe still; water cooling tower; laboratory building and equipment; pipe and equipment in water well; 2,000 barrel-capacity Bubble Tower; bathhouse and equipment; office equipment, typewriter, and filing cabinets; being all of the equipment, fixtures, machinery, and appurtenances pertaining to, used in connection with, or in any way incident to the Texas Refinery. Said chattel mortgage created a prior and subsisting lien, which is still subsisting, against such property to secure the payment of such note, and all amounts due thereon, and a certified copy of such chattel mortgage is hereto attached, marked Exhibit "A" and made a part hereof, and here referred to and adopted for all intents and purposes; which chattel mortgage was duly filed for record on the 20th day of September 1933, in the office of the County Clerk of Gregg County, Texas, recorded in Volume 38, page 31, of the Chattel Mortgage Records thereof, to which record reference is here made.

That during the progress of this litigation, the said R. P. Ash filed his plea of intervention herein, as will be more fully shown by his plea so filed herein, which plea of intervention alleged that the receivership estate and the said W. L. Nix, doing business as Texas Refinery, owed him approximately the sum of

73 $4,651.86, plus interest at the rate of 6% per annum from the 19th day of September 1933, and 10% upon both principal and interest as attorney's fee, all of which is more fully evidenced by the above-described note, which plea further alleged the execution of said chattel mortgage by the said W. L. Nix, doing business as Texas Refinery, and against its properties and assets.

That on or about the 12th day of July, A. D. 1937, in consideration of the sum of $1.00 and other good and valuable considerations, and for a valuable consideration, then paid and delivered to him by your intervenor, the said R. P. Ash transferred and assigned to your intervenor all his rights, title, and interest in and to the moneys held in the registry of this court, and as a part of said assignment assigned and conveyed to your intervenor all rights, title, and interest which the said R. P. Ash owned or claimed in and to the moneys derived from a sale of the property in the hands of the Receiver in the above-entitled and numbered cause, thereby conveying to your intervenor all of the prior rights, title, and interest then owned by the said R. P. Ash in and to said sum or sums of money by virtue of the execution of the above-mentioned note and chattel mortgage executed to the said R. P. Ash by the said W. L. Nix, doing business as Texas Refinery; and the said R. P. Ash thereby transferred and assigned to your intervenor his cause of action in the above-entitled and numbered suit.

Thereafter, on the — day of December, A. D. 1937, your intervenor filed his original plea of intervention in the above-entitled and numbered cause, thereby giving to the Receiver
74 herein, and all parties herein, either plaintiff, defendant, or intervenor, full and accurate notice of such transfer and assignment, and demanded thereby the payment of said note as secured by said chattel mortgage.

Your intervenor alleges that there are no just discounts or defenses against the said note.

The defendant, W. L. Nix, has at all times after such notice and after demand therefor refused and failed to make payment of such note or any part thereof, to intervenor's damage in the sum of $4,651.86, plus interest at the rate of 6% per annum from the 19th day of September 1933, and 10% on both principal and accrued interest as attorneys' fees.

Your intervenor, being now the legal owner and holder of said note and chattel mortgage, on the — day of ——, 193—, after such note was due and payable, and after having made demand for the payment of such note, placed such note, after maturity, in the hands of the undersigned attorneys for collection, agree-

ing with them to pay to them the said amount as attorneys' fees for their services in connection with such note, which is a reasonable amount therefor.

That heretofore, to wit, on the 20th day of November, A. D. 1933, M. R. Ingram brought this suit against W. L. Nix in person and against W. L. Nix trading as Texas Refinery, and upon the said M. R. Ingram's petition, of even date with the filing of the said suit, this Honorable Court appointed J. G. Strong receiver for said Texas Refinery, who immediately qualified and took charge of said Texas Refinery, and same was operated by said receiver until on or about November 5, A. D. 1935.

75 That on or about said date of November 5, 1935, pursuant to an order theretofore issued out of this Court, an order of sale was approved for the sale of said Texas Refinery, which said properties were sold for, and brought, approximately the sum of $7,516.92; that upon said sale, and the winding up of the affairs of the receivership estate, the said receiver paid into this Court on November 5, 1935, the said sum of $7,516.92, and allowed said receiver a fee of $50.00 out of this sum, in addition to fees theretofore paid to him, leaving a balance of $7,466.92, which said sum is still in the registry of this Court.

That on or about December 21, 1936, the said W. L. Nix, for valuable consideration, by his assignment in writing, sold, assigned, and conveyed to intervenor all his rights, titles, and interests in and to said sum of $7,466.92, now in the registry of this Court, and intervenor thereby acquired whatever interest then held and owned by the said W. L. Nix.

Intervenor alleges that by virtue of the execution of said note and chattel mortgage by the said W. L. Nix, doing business as Texas Refinery, and the assignment of said note, chattel mortgage, and cause of action by the said R. P. Ash to your intervenor, that your intervenor, Howard Dailey, has a claim which is prior to any other valid and subsisting claim herein, in that said note and chattel mortgage were executed to secure the said R. P. Ash for the said sum of $4,651.86, which was used by the said W. L. Nix and Texas Refinery to purchase, repair, and replace equipment of and upon and incident to said Texas Refinery, and that said chattel mortgage above mentioned was duly filed for record on the 20th day of September 1933, at 3 o'clock P. M., in the office of the County Clerk, Gregg County, Texas, and recorded in

76 Volume 38, page 31, of the Chattel Mortgage Records of Gregg County, Texas, to which record reference is here made; that all of the claims herein, other than the claim of your intervenor, were incurred subsequent to the execution and recordation of said chattel mortgage, and therefore are inferior to the

claim of your intervenor; and that if any claim of any of the intervenors or other parties accrued prior to the execution and recordation of said chattel mortgage, said purported lien or claim was not duly set up, registered, or recorded in such manner as to give notice to the said R. P. Ash, from whom your intervenor has acquired all rights, title, and interest.

Wherefore, premises considered, intervenor prays that on final hearing hereof your intervenor's claim be in all things approved and allowed, and that he be given judgment in the amount of his claim, and that his said claim be decreed a prior and superior claim and lien to all other claims of any of the parties herein, whether plaintiff, defendant, or intervenors, and that an order be entered directing payment of his said claim from the funds now held in the registry of the Court, and for his costs of suit, and for such other and further relief, general and special, to which he may show himself justly entitled, and intervenor will ever pray.

A. H. SHAW,
JAMES L. LATTIMORE,
By JAMES L. LATTIMORE,
Attorneys for Intervenor.

77 *Exhibit A to amended plea of intervention*

THE STATE OF TEXAS,
County of Gregg.

Know all men by these presents: That I, W. L. Nix, Owner of the Texas Refinery of Kilgore, County of Gregg, State of Texas, party of the first part, mortgagor, being justly indebted to R. P. Ash of Carthage, County of Panola, State of Texas, party of the second part, mortgagee, in the sum of $4,651.86, which indebtedness is hereby confessed and acknowledged, for the purpose of securing payment of said debt and interest and in consideration of the sum of One Dollar ($1.00), the receipt whereof is hereby acknowledged, has granted, bargained, sold and mortgaged, and by these presents does grant, bargain, sell, and mortgage unto said mortgagee, the following described goods, chattels, and personal property, to wit:

1 1,500 Bbl. Capacity pipe still	$788.14
Water cooling Tower	484.75
Labratory-Building & Equipment	141.62
Pipe & Equipment in Water Well	157.35
2,000 bbl. capacity Bubble Tower	3,000.00
Bath House & Equipment	30.00
Office Equipment-Typewriter & Filing Cabinets	50.00
Total	4,651.86

To hage and to hold the same unto said mortgagee, said mortgagee's personal representative, successors, and assigns forever.

Provided, and these presents are upon the express condition, that if said mortgagor shall well and truly pay or cause to
78 be paid to said mortgagee said sum above mentioned, with interest thereon, in accordance with the terms of his certain promissory note bearing even date herewith, signed by said mortgagor, payable to said mortgagee or order as follows, to wit: $4,651.86 due on or before Demand $_____.

And any renewals of the same, or any part thereof, with interest thereon, together with any sum or sums advanced or that may during the life of this mortgage be advanced, or paid to, or for the account of the said mortgagor, or expended in repairing or improving said mortgaged property, and also any other indebtedness for which the undersigned may be or become liable to the mortgagee herein, either as principal, endorser, surety, or guarantor; and shall punctually and faithfully perform each, all and every of the covenants, stipulations, and agreements herein contained on his part to be performed, then this instrument shall be void, otherwise to remain in full force and effect.

Said mortgagor further promises that he will use said goods and chattels with reasonable care, skill, and caution, and keep same in good repair and under shelter, and will not use or permit them to be used for hire, and will not permit the same to be damaged, injured, or depreciated, and will not attempt to sell, assign, or dispose of said goods and chattels or any interest therein; or remove, or permit the same to be removed from the county where he resides, without the written consent of said mortgagee, and will not encumber or permit any encumbrance or lien of any character whatsoever against the same; and that he will pay all taxes that may be levied against said goods and chattels.

79 Said mortgagor further covenants and agrees to keep said goods and chattels insured against loss or damage by fire and theft; loss, if any, payable to said mortgagee as said mortgagee's interest may appear.

And in case said mortgagor shall neglect or refuse to obtain said insurance or pay such taxes as aforesaid, then said mortgagee may at said mortgagee's option obtain such insurance and pay all such taxes and assessments aforesaid; and all sums of money thus expended are hereby secured by these presents, and shall be repayable with interest upon demand from said mortgagor to said mortgagee, and may be retained by said mortgagee from the proceeds of the sale of said goods and chattels herein authorized.

In case default be made in the payment of said debt, or interest, or any of the said notes, or any extension or renewals thereof; or if any execution, attachments, sequestration, or other writ shall be levied on said goods and chattels, or if a petition for receiver or in

bankruptcy shall be filed by or against said mortgagor, or if said mortgagor shall make an assignment for the benefit of his creditors, or if said mortgagor shall fail to keep and perform any of the covenants, stipulations, and agreements herein contained on his part to be performed or if said mortgagee shall at any time deem said mortgagor, said chattels, said debt, or said security unsafe or insecure, then upon the happening of said contingencies or any of them, the whole amount herein secured remaining unpaid, is by said mortgagor admitted to be due and payable, and said mortgagee may at said mortgagee's option (notice of which option is hereby expressly waived), foreclose this mortgage by
80 action or otherwise, and said mortgagee is hereby authorized to enter upon the premises where said goods and chattels may be, and remove and sell the same and all equity of redemption of the mortgagor therein, either at public auction or private sale at Carthage, Texas, or elsewhere, without demand for performance, and out of the proceeds of said sale pay the cost of foreclosing this mortgage, and the expense of pursuing, taking, keeping, advertising, and selling said goods and chattels, including a reasonable attorney's fee, and apply the residue thereof towards the payment of said indebtedness or any part thereof, in such manner as said mortgagee may elect, rendering the surplus, if any, unto said mortgagor, his executors, administrators, and assigns upon demand.

And said mortgagee may purchase at such sales in the same manner, and to have the same effect as any person not interested herein.

This mortgage shall apply to and bind said mortgagor, his personal representatives, and assigns, and inure to the benefits of said mortgagee, said mortgagee's personal representatives, successors, and assigns.

In witness whereof the mortgagor has hereunto set his hand this 19 day of September 1933 at Kilgore, Texas.

TEXAS REFINERY,
By W. L. NIX.

Witnesses:
S. B. POPE.
GRANT GOOD.

81 THE STATE OF TEXAS.
County of Gregg.

Before me, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Texas Refinery by W. L. Nix known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the 26th day of Sept. A. D. 1933.

[L. S.] EDNA PARDUE.
Notary Public in and for Gregg County, Texas.

82 In District Court of Gregg County

[Title omitted.]

Answer of Intervenor, The United States, to Plea of Intervention Filed by Howard Dailey

Filed January 21, 1938

To the Honorable CLARENCE E. MCGAW, *Judge of Said Court:*

Now comes the intervenor, United States of America, in answer to the plea of intervention herein filed by Howard Dailey, and respectfully represents and shows to the Court:

I

The intervenor, United States, demurs generally to the plea of intervention of Howard Dailey and states that it is insufficient as a matter of law to require an answer and should be dismissed.

II

The intervenor, United States, specially further excepts to the plea of intervention of Howard Dailey and says that it is insufficient in law to require an answer for the reason that it is vague and indefinite and does not state sufficient facts which, if proven, would entitle intervenor, Howard Dailey, any judgment or relief in this proceeding.

III

The intervenor, United States, further specially further excepts to the plea of intervention of Howard Dailey as follows:

A. The intervention of Howard Dailey fails to allege that any money or other consideration of value was paid by him to R. P. Ash for the alleged assignment of his claim against W. L. Nix.

83 B. The intervention of Howard Dailey does not allege that the defendant, W. L. Nix, was or is indebted to R. P. Ash, or that said R. P. Ash had a valid claim against the defendant, W. L. Nix, and fails to allege any facts which show or tend to show that R. P. Ash has any claim against W. L. Nix and Texas Refinery.

C. The intervention of Howard Dailey fails to allege that the partnership of Ingram & Stegall had at any time a valid claim against W. L. Nix or that W. L. Nix was or is indebted to the said partnership of Ingram & Stegall, and fails to allege any facts which show or tend to show that W. L. Nix is indebted to said partnership or that the said partnership has any claim against W. L. Nix or the assets of the Texas Refinery.

IV

Answering further herein, if need be, and without abandoning any of its demurrers and exceptions, the intervenor, United States, denies all and singular the allegations in the plea of intervention of Howard Dailey and says that they are not true, either in whole or in part, and demands strict proof thereof, and of this it puts itself upon the country.

Wherefore intervenor, United States, prays that Howard Dailey be denied all relief thereunder.

STEVE M. KING,
United States Attorney,
By J. L. B.,
JAMES L. BACKSTROM,
Special Attorney,
Bureau of Internal Revenue.

84

V

Answering further, if need be, and without waiving any of the foregoing, and pleading the true facts, the intervenor, United States, respectfully pleads and shows to the Court that defendant is not and never was indebted to R. P. Ash, and that if intervenor is mistaken in this, that any and all indebtedness of W. L. Nix to R. P. Ash had been paid and fully discharged by W. L. Nix long prior to the filing of a plea of intervention herein by R. P. Ash, and that the defendant W. L. Nix was not indebted to R. P. Ash in any sum at the time of the filing of his plea of intervention by R. P. Ash; that intervenor Howard Dailey has paid no consideration to R. P. Ash or anyone else for the purported assignment to him and that he is not the owner of said claim or any interest R. P. Ash may have in the funds of W. L. Nix and Texas Refinery, receivership, now in the hands of this Court;

That in his plea of intervention R. P. Ash alleged that he owned two notes secured by a lien on certain property of the Texas Refinery, and that two notes totaling $1,750 had been given one R. W. Porter by the Heartfield Refining Company prior to the

acquisition of said refinery by W. L. Nix who assumed said indebtedness when he acquired the refinery, and that the said R. W. Porter transferred said notes for a valuable consideration to said intervenor, R. P. Ash, on August 26, 1933. The intervenor, United States, would respectfully show that prior to any purported assignment to R. P. Ash, that R. W. Porter had been paid in full all amounts due him by W. L. Nix and represented by
85 said notes and mortgage, and that said notes and mortgages having been satisfied, that R. P. Ash acquired no lien on any of the property of W. L. Nix and Texas Refinery by any purported assignment thereof.

The United States further respectfully shows that, on or about September 19, 1933, when intervenor R. P. Ash alleges defendant W. L. Nix executed and delivered to him a note for $4,651.86 secured by certain property of the Texas Refinery, said defendant W. L. Nix was not indebted to R. P. Ash for said sum *of* any other sum, and that the intervenor acquired no mortgage or lien by the execution and delivery to him of paper writings purporting to be a note for $4,651.86 and a mortgage to secure payment of same; and that there was no consideration received by W. L. Nix for executing and delivering such note and mortgage, if such were executed and delivered to R. P. Ash.

That if said note and mortgage were valid when purported to have been executed and delivered, that subsequently thereto in September, October, November, and December 1933, W. L. Nix paid to R. P. Ash all sums owing to him including said note and mortgage and they thus were satisfied and no longer a lien on any of the property of W. L. Nix and the Texas Refinery.

VI

The intervenor, United States, specifically denies that the partnership of Ingram & Stegall has filed in this proceeding a petition of intervention and that W. L. Nix was or is indebted to said partnership, or that said partnership has any claim against W. L. Nix or any lien on the property taken into possession by the Receiver in this proceeding, and specifically denies that In-
86 gram & Stegall, a partnership, assigned any claim here to intervenor, Howard Dailey, and that he has interest in any claim against or interest in the funds in the hands of this Court asserted by said partnership Ingram & Stegall, or anyone else.

Wherefore, intervenor United States prays for judgment upon its demurrers and exceptions and that Howard Dailey be denied all relief sought under his plea of intervention, and prays the allowance of its claim as by law required and that its claim be

held to be prior to all other claims herein and such other and further relief, to which it might show itself justly entitled.

STEVE M. KING,
United States Attorney.
by J. L. B.
JAMES L. BACKSTROM,
Special Attorney,
Bureau of Internal Revenue.

[*Duly sworn to by James L. Backstrom; jurat omitted in printing.*]

87 In District Court of Gregg County

[Title omitted.]

Answer of intervenor, United States, to petition of intervention of Intervenor R. P. Ash

Filed Jan. 21, 1938

To the Honorable CLARENCE E. MCGAW, *Judge of said Court:*

Now comes the United States of America, intervenor in this proceeding, and in answer to the petition of intervention filed herein by R. P. Ash, intervenor, respectfully pleads and shows to the court:

I

The intervenor, the United States, demurs generally to the petition of intervention of R. P. Ash, intervenor herein, and says that the same fails to state a cause of action and should be dismissed.

II

Now comes the intervenor, United States of America, without waiving its demurrer to the plea of intervention of R. P. Ash, but still insisting thereon, and denies all and singular the allegations contained in said plea of intervention and demands strict proof thereof, and of this it puts itself upon the country.

Wherefore, intervenor, the United States, prays that the intervenor, R. P. Ash, take nothing by his suit and that the United States recover its judgment and all costs herein.

STEVE M. KING,
United States Attorney.
by J. L. B.
JAMES L. BACKSTROM,
Special Attorney,
Bureau of Internal Revenue.

88 III

Now comes the intervenor, the United States of America, by way of special answer and denies that the intervenor, R. P. Ash, has any interest in the matter involved in this proceeding, and denies that defendant, W. L. Nix, is indebted to intervenor, R. P. Ash, and denies that R. W. Porter for valuable consideration sold, transferred and delivered two notes of W. L. Nix and the Heartfield Refining Company, Inc. as alleged in paragraph II of the plea of intervention to R. P. Ash, and denies that R. P. Ash ever paid any consideration to R. W. Porter for said notes, and denies that R. P. Ash was the owner and holder of said note and lien. And further specifically alleges that the notes of the Heartfield Refining Company, Inc., payable to R. W. Porter, payment of which was assumed by W. L. Nix, were paid and satisfied by W. L. Nix, and alleges that any lien which may have been fixed upon any of the assets of the refinery acquired by W. L. Nix from the Heartfield Refining Company, Inc., by reason of said notes and mortgages were fully satisfied, and that said property was not subject to any lien by reason thereof at the time of the appointment of the receiver in this case.

Answering further herein the United States by way of special answer denies that on or about September 19, 1933, the defendant, W. L. Nix, made and executed and delivered to intervenor, R. P. Ash, his promissory note for $4,651.86, or any other sum. Denies that any consideration passed from intervenor R. P. Ash to W. L. Nix for the said note alleged in said intervenor's
89 petition of intervention, and denies that at that time or any time thereafter was W. L. Nix indebted to intervenor, R. P. Ash, for any sum; and denies that by reason of the chattel mortgage purported to have been executed on September 19, 1933, and filed for registration with the County Clerk of Gregg County, Texas, that R. P. Ash acquired or held any lien or mortgage against any of the property of W. L. Nix and the Texas Refinery. Intervenor further specifically denies that intervenor, R. P. Ash, was at the time of the filing of the petition of intervention the owner or holder of any valid note or mortgage of W. L. Nix.

The intervenor, the United States, further pleads and shows to the Court that in the event it should be proven that R. P. Ash held a valid note or mortgage of W. L. Nix on the property of the Texas Refinery, intervenor alleges that after the signing of said note and mortgage, if such were signed and delivered by W. L. Nix to intervenor, R. P. Ash, that W. L. Nix during September, October, November, and December 1933 paid to said intervenor, R. P. Ash, all amounts owing by him to said R. P.

Ash, including said notes, and that thereafter said defendant, W. L. Nix, was not indebted to said intervenor, R. P. Ash, for any sum whatsoever.

Wherefore, the intervenor, the United States, prays that the intervenor, R. P. Ash, his assignees, or anyone claiming through him, take nothing by their suit herein, and that the United States have its claim filed in this proceeding allowed as set out
90 in its plea of intervention, and that it be allowed priority in payment over all other claims and all costs of suit and such other and further relief, general or specific, to which it might show itself justly entitled.

STEVE M. KING,
United States Attorney.
by J. L. B.
JAMES L. BACKSTROM,
Special Attorney,
Bureau of Internal Revenue.

[*Duly sworn to by James L. Backstrom; jurat omitted in printing.*]

91 In District Court of Gregg County

[Title omitted.]

Answer of intervenor, United States, to petition of plaintiff

Filed January 21, 1938

To the Honorable CLARENCE E. MCGRAW, *Judge of said Court:*

Now comes the United States of America, hereinafter styled intervenor, and in answer to the petition of M. R. Ingram, plaintiff herein, respectfully represents and shows to the Court as follows:

I

Intervenor, the United States, demurs generally to plaintiff's petition and states that it is insufficient as a matter of law to require an answer and should be dismissed.

II

Now comes intervenor, the United States, without waiving its demurrer to plaintiff's petition but still insisting thereon, denies all and singular the allegations contained in plaintiff's petition, and demands strict proof thereof, of this it puts itself upon the country.

Wherefore intervenor, the United States of America, prays that the plaintiff take nothing by his suit, and that intervenor recover its judgment and all costs herein.

STEVE M. KING,
United States Attorney.
By J. L. B.,
JAMES L. BACKSTROM,
Special Attorney,
Bureau of Internal Revenue.

92 III

Now comes intervenor, the United States of America, and denies that the Heartfield Refining Company, Inc., executed and delivered to plaintiff its promissory note as alleged in the plaintiff's petition; denies that there was any consideration therefor passing from the Heartfield Refining Company, Inc., to the plaintiff; denies that the plaintiff was given a lien upon any property by the Heartfield Refining Company, Inc.; denies that the property alleged in the plaintiff's petition was owned by the defendant, W. L. Nix, and the Texas Refinery when the plaintiff's petition was filed in this case and the receiver appointed by this Court; and denies that the receiver in this proceeding took into his possession any property upon which the plaintiff held a lien, as alleged in paragraph II of plaintiff's petition.

The intervenor denies specifically the allegations of paragraphs III, IV, V, VI, and VII of plaintiff's petition, and further specifically denies that W. L. Nix in the acquisition of the refining plant from the Heartfield Refining Company, Inc., acquired any property or assets upon which the plaintiff held a lien, and denies that W. L. Nix became bound, obligated, and promised to pay the note of the Heartfield Refining Company, Inc., to the plaintiff.

The intervenor admits the allegations of paragraph VIII of plaintiff's petition that W. L. Nix is wholly insolvent and unable to pay his debts, but denies that plaintiff held a mortgage
93 on the specific property alleged in plaintiff's petition and that such property was operated and used as part of the Texas Refinery.

Intervenor admits the allegation contained in paragraph IX of plaintiff's petition.

The intervenor further admits in view of the various claims asserting liens against the property of W. L. Nix, the allegations of the plaintiff that a receiver should be appointed to take possession of the property of W. L. Nix.

Further answering herein, the intervenor alleges that the plaintiff, W. L. Nix, is indebted to the United States for gasoline taxes for which claims have been filed by W. A. Thomas, Collector of

Internal Revenue, in this proceeding, and also petition of intervention by counsel for the United States, and further alleges that W. L. Nix and the Texas Refinery was at the time of appointment of the receiver, and is at the present time, insolvent, and that the United States' claim for taxes is entitled to priority in payment over all other claims and that the United States has a lien upon all the assets of W. L. Nix including all the assets of the Texas Refinery involved in this proceeding for the taxes due the United States from the dates that the assessment lists for taxes due and owing to the United States were received by the Collector of Internal Revenue at Dallas, Texas, as set out in the claim filed in this proceeding.

Wherefore, the intervenor, the United States, prays that plaintiff take nothing by his suit herein, and that the claim of the United States for taxes be approved and that the United
94 States recover judgment in accordance with its plea of intervention herein and all costs of suit, and that the United States is entitled to priority in payment over all other claims and such other and further relief, general or special or specific as to which it might show itself justly entitled.

STEVE M. KING.
United States Attorney.
by J. L. B.
JAMES L. BACKSTROM,
Special Attorney,
Bureau of Internal Revenue.

[*Duly sworn to by James L. Backstrom; jurat omitted in printing.*]

95 In District Court of Gregg County

[Title omitted.]

Answer of intervenor, State of Texas, to petition of plaintiff, M. R. Ingram

Filed January 21, 1938

To the Honorable CLARENCE M. MCGAW, *Judge of Said Court:*

Now comes the State of Texas, hereinafter styled intervenor, and in answer to the petition of M. R. Ingram, plaintiff herein, respectfully represents and shows to the Court as follows:

I

Intervenor, the State of Texas, demurs generally to plaintiff's petition and states that it is insufficient as a matter of law to require an answer and should be dismissed.

II

Now comes intervenor, the State of Texas, without waiving its demurrer to plaintiff's petition but still insisting thereon, denies all and singular the allegations contained in plaintiff's petition, and demands strict proof thereof, of this it puts itself upon the country.

Wherefore, intervenor, State of Texas, prays that the plaintiff, M. R. Ingram, take nothing by his suit, and that the State of Texas recover its judgment for motor-fuel taxes, penalties, and interest, for foreclosure of its statutory tax lien upon the properties and estate of this receivership or the proceeds therefrom, and that such lien be decreed a paramount preferred lien to any and all liens, claims, or rights asserted herein, all as more specifically prayed in its petition of intervention herein.

WM. MCCRAW,
Attorney General of the State of Texas.
PAT M. NEFF, JR.,
Assistant Attorney General.

In District Court of Gregg County

[Title omitted.]

Answer of intervenor, State of Texas, to intervention of R. P. Ash

Filed January 21, 1938

To the Honorable CLARENCE E. MCGAW, *Judge of Said Court:*

Now comes the State of Texas, intervenor in this proceeding, and in answer to the petition of intervention filed herein by R. P. Ash, intervenor, respectfully pleads and shows to the court:

I

The intervenor, the State of Texas, demurs generally to the petition of intervention of R. P. Ash, intervenor herein, and says that the same fails to state a cause of action and should be dismissed.

II

Now comes the intervenor, the State of Texas, without waiving its demurrer to the plea of intervention of R. P. Ash, but still insisting thereon, and denies all and singular the allegations contained in said plea of intervention and demands strict proof thereof, and of this it puts itself upon the country.

III

For further answer, if such be required, intervenor, State of Texas, hereby adopts all and singular the material
97 allegations contained in paragraph III of the answer filed herein by the United States of America on the — day of January, A. D. 1938, to the petition of intervention of R. P. Ash, and requests that such allegations be incorporated in this answer to all intents and purposes the same as if specifically alleged herein.

Wherefore, intervenor, State of Texas, prays that the intervenor, R. P. Ash take nothing by his suit and that the State of Texas recover its judgment for motor-fuel taxes, penalties, and interest, for foreclosure of its statutory tax lien upon the properties and estate of this receivership or the proceeds therefrom, and that such lien be decreed a paramount preferred lien to any and all liens, claims, or rights asserted herein, all as more specifically prayed in its petition of intervention herein.

WM. MCCRAW,
Attorney General of the State of Texas.
PAT M. NEFF, JR.,
Assistant Attorney General.

98 In District Court of Gregg County

[Title omitted.]

Answer of intervenor, State of Texas, to intervention of Howard Dailey

Filed January 21, 1938

To the Honorable CLARENCE E. MCGAW, *Judge of said Court:*

Now comes the State of Texas, intervenor in this proceeding, and in answer to the petition of intervention filed herein by Howard Dailey, intervenor, respectfully pleads and shows to the Court:

I

The intervenor, the State of Texas, demurs generally to the petition of intervention of Howard Dailey, intervenor herein and says that the same fails to state a cause of action and should be dismissed.

II

Now comes the intervenor, the State of Texas, without waiving its demurrer to the plea of intervention of Howard Dailey, but still

insisting thereon, and denies all and singular the allegations contained in said plea of intervention and demands strict proof thereof, and of this it puts itself upon the country.

Wherefore, intervenor, State of Texas, prays that the
99 intervenor, Howard Dailey, take nothing by his suit and that the State of Texas recover its judgment for motor-fuel taxes, penalties, and interest, for foreclosure of its statutory tax lien upon the properties and estate of receivership or the proceeds therefrom, and that such lien be decreed a paramount preferred lien to any and all liens, claims, or rights asserted herein, all as more specifically prayed in its petition of intervention herein.

WM. MCCRAW,
Attorney General of the State of Texas.
PAT M. NEFF, JR.,
Assistant Attorney General.

101 In the Special District Court of Gregg County, Texas

No. 2394-B

M. R. INGRAM

vs.

W. L. NIX ET AL.

Judgment

Filed March 30, 1938

On January 21, 1938, came on to be heard the claims of the various creditors and the question of priorities of such creditors, and the following creditors and their counsel appeared before the Court and presented to the Court their claims and evidence in support thereof: Intervenors: Howard Dailey, the State of Texas, and the United States.

The other parties, claimants and intervenors, made no appearance, and after considering the pleadings of the various parties and hearing the evidence, and the argument of counsel the Court hereby enters the following judgment:

I

The Court overrules all preliminary pleas, demurrers, and exceptions filed in this proceedings, and finds against all the parties who made no appearance for lack of prosecution, and disallows

all claims and interventions filed herein of those claimants who made no appearance.

II

The Court finds that the defendant, W. L. Nix, doing business as the Texas Refinery, on the 19th day of September 1933, for a valuable consideration, and prior to the time that the lien for taxes of either the United States or the State of Texas had attached, executed, and delivered to R. P. Ash his promissory note of that date and thereby promised to pay R. P. Ash the sum of $4,651.86 at 6% interest per annum thereon from said date
102 and 10% attorneys' fees upon the principal and interest if placed in the hands of an attorney for collection; and that on said date the defendant, W. L. Nix, doing business as the Texas Refinery, executed and delivered to the said R. P. Ash his chattel mortgage whereby he granted, sold, and conveyed to R. P. Ash the following-described property to secure the payment of the above-described note:

1 1,500-barrel capacity pipe still, water-cooling tower, laboratory building and equipment, pipe and equipment in water well; 2,000-barrel capacity Bubble Tower, bath house and equipment, office equipment, typewriter and filing cabinets, which said chattel mortgage was duly filed for record in the office of the County Clerk of Gregg County, Texas, the county in which said property was located, September 20, 1933.

That from and after September 19, 1933, R. P. Ash held a valid subsisting mortgage and lien on said property to secure the payment of the said note, which said note, nor any part of it, had been paid, and that on or about the 12th day of July 1937 R. P. Ash, for a valuable consideration, transferred and assigned said note and mortgage and lien on said property to the intervenor, Howard Dailey, and that the intervenor, Howard Dailey, has a valid, prior, and subsisting lien upon the proceeds of said property for the payment of said note. The Court finds that the Receiver appointed in this proceeding sold and disposed of the physical assets of the Texas Refinery, for which he received the sum of $1,618.50, and that the property covered by the said mortgage and lien belonging to Howard Dailey represented 80%
103 of the physical assets, and that Howard Dailey has a valid and subsisting lien upon $1,294.80, representing the proceeds from the property covered by said mortgage from W. L. Nix to R. P. Ash. That the lien of Howard Dailey as to the sum of $1,294.80 is prior and superior to that of the claims and liens of the United States and the State of Texas.

The Court, therefore, orders, decrees, and adjudges that the said intervenor, Howard Dailey, have judgment against W. L. Nix and the Texas Refinery for the sum of $1,294.80, together with interest at the rate of 6% per annum upon said amount from the date of the entry of this judgment until paid, and that said intervenor is entitled to have said amount paid out of the proceeds in the custody of the Court ahead of and prior to the claims of the United States and the State of Texas.

III

The Court finds that J. G. Strong, formerly the Receiver in this proceeding, and while acting as such under appointment in this proceeding, operated the properties of the Texas Refinery, and later under the orders of the Court in this proceeding sold and disposed of all the assets of W. L. Nix and the Texas Refinery, and has paid and discharged all the costs of administration in connection therewith, and has turned into the custody of the Court the sum of $7,516.92. The Court finds, in accordance with agreement with all the parties, that the Receiver is entitled to the sum of $75.00 for payment of services rendered in this proceeding since the final report of the Receiver and the turning into the custody of the Court the said sum of $7,516.92.

104

IV

The Court finds that the Receiver, J. G. Strong, realized all that could have been realized from the assets of W. L. Nix operating as the Texas Refinery, and that such assets are less than the amount of the liabilities of W. L. Nix operating as the Texas Refinery, and that on November 20, 1933, the date of the institution of this proceedings, and since that date up to the date of this judgment that W. L. Nix, operating as the Texas Refinery and this receivership proceedings was and has been at all times insolvent.

V

The Court finds that W. L. Nix, operating as the Texas Refinery, incurred and became and is liable to the United States of America for gasoline taxes and penalty in the total amount of $19,343.91. That said taxes have been assessed by the Commissioner of Internal Revenue and that the United States has a lien upon all the assets of W. L. Nix and the Texas Refinery from the dates that said assessment lists were received by the Collector of Internal Revenue at Dallas, Texas. The Court finds the taxes due the United States and when they became due and the liens therefor are as follows:

Tax	Period	Amount of tax	Date due	Penalty	Date lien attached
Gasoline	May 1933	$480.40	6-30-33		Jan. 24, 1934
"	June 1933	1,036.11	7-31-33	$259.03	Dec. 20, 1933
"	July 1933	949.81	8-31-33		Dec. 20, 1933
"	Aug. 1933	2,488.88	9-30-33		Dec. 20, 1933
"	Sept. 1933	3,014.56	10-30-33		Jan. 20, 1934
"	Oct. & Nov. 1933	11,115.12	12-31-33		Jan. 20, 1934
		$19,084.88		$259.03	

Total tax & penalty $19,343.91.

105 It is further ordered, adjudged, and decreed that the claims of the Collector of Internal Revenue are allowed and that the United States Government have judgment for the full amount of its claim in the total sum of $19,343.91 against the Defendant, W. L. Nix, operating as the Texas Refinery, and that its liens attached to the property in this receivership on the dates aforesaid and that the United States is entitled to interest on said amounts from the dates they became due.

VI

It is further ordered, adjudged, and decreed that the claim of the State of Texas for Taxes is allowed in full, and that it do have and recover judgment against W. L. Nix Operating as the Texas Refinery, for the full amount of its claims, principals, interest, fines and penalties in the total amount of $42,812.51, which is the total delinquent motor fuel tax sued for with penalties and interest to date of judgment, less a credit of $2,500 by reason of payment to the State of Texas for such sum on January 17, 1938, by Republic Underwriters, Inc., in full discharge and payment of its undertaking as surety on statutory surety bond executed by the defendant distributor.

The court finds that the motor fuel taxes claimed by the State of Texas and the supporting lien therefor under Section 7, Article 7065A, Revised Civil Statutes, accrued and arose on the following dates and in the following amounts, to wit:

Period	Net delinquent gallons	Net delinquent tax	Penalties	1938 at 10%	Total	Date lien attached
1933						
October	410-180	$16,407.20	$328.14—2%	$6,977.55	$23,712.89	
	1-17-38—Less payment of bond by Republic Underwriters				2,500.00	Nov. 20, 1933
106 November	318-689	12,747.56	1,312.58—8%	540.16	1,852.74	Nov. 20, 1933
			254.95—2%	5,313.17	18,315.68	Dec. 20, 1933
			1,019.80—8%	411.40	1,431.20	Dec. 20, 1933
	Allow payment of bond, Cr.			$2,500.00		
		$29,154.76	$2,915.47	$10,742.28	$42,812.51	

VII

As between the State of Texas and the United States Government, the Court finds and holds that the United States is entitled to priority in payment ahead of the State of Texas and that the liens of the United States are first and superior to that of the State of Texas and that the United States is entitled to full payment of its claim before any sum of money is paid to the State of Texas on its claim filed herein.

VIII

It is further ordered, adjudged, and decreed that the claims of the United States shall bear interest at the rate of 6% per annum from the dates that the taxes became due until paid, and the claim of the State of Texas shall bear interest from the date of this judgment at the statutory rate of 10% per annum.

IX

It is further ordered, adjudged, and decreed that except as hereinabove specified, no creditor of the defendant, W. L. Nix, operating as the Texas Refinery, is entitled to judgment against said defendant for any amount and no claimants not specifically named in this judgment are allowed any relief or judgment against the defendant, W. L. Nix, operating as the Texas Refinery.

107

X

It is further ordered, adjudged, and decreed that the money in the custody of the Court shall be disbursed in order of priority as follows:

1. Payment of all court costs incurred in this cause which have not been paid by the Receiver, and payment of additional compensation of $75.00 to J. G. Strong, former Receiver.

2. Payment of the claim of the intervenor, Howard Dailey, in the sum of $1,294.80.

3. Payment of the balance of the amount in the custody of the Court to the United States to be applied upon its judgment in this case, inasmuch as the claim of the United States as allowed is greater than the amount of money in the hands of the Court, and there will be nothing left to be applied on the claim of the State of Texas allowed herein.

XI

To all of which the intervenor, the State of Texas, thereupon in open court objected and excepted, and to all of which judgment

with respect to the claim of Howard Dailey the United States in open Court objected and excepted, and both the State of Texas and the United States in open Court gave notice of appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, Texas.

D. S. MEREDITH, JR., *Judge.*

Approved as to form.

HOWARD DAILEY,
Intervenor.
JAMES L. BACKSTROM,
Special Attorney,
Bureau of Internal Revenue.
PAT M. NEFF, JR.,
Asst. Atty. General.

108 In District Court of Gregg County

[Title omitted.]

Findings of fact and conclusions of law

Filed May 19, 1938

In response to the request of the United States Government and of the State of Texas, in the above-entitled and numbered cause, I find, make, and file the following as my findings of fact and conclusions of law herein:

Findings of fact

1. I find that the Texas Refinery was owned and operated by W. L. Nix in 1933.

2. I find that on September 19, 1933, for a valuable consideration W. L. Nix executed and delivered to R. P. Nash his promissory note of that date in the sum of $4,651.86, bearing interest at the rate of 6% per annum from date, and providing for the usual 10% attorney's fees.

3. I find that W. L. Nix, doing business as Texas Refinery, on September 19, 1933, executed and delivered to R. P. Nash a chattel mortgage to secure the payment of said note, said chattel mortgage covering the following described property: 1—500-barrel-capacity pipe still; Water cooling tower; Laboratory building and equipment; Pipe and Equipment in water well; 2,000-bbl.-capacity Bubble tower; Bath House and equipment; Office Equipment, typewriter and filing cabinets.

109 4. I find that said chattel mortgage was duly filed in the office of the County Clerk of Gregg County on September 20, 1933.

5. I find that on or about July 12, 1937, R. P. Nash, for a valuable consideration, transferred and assigned said note and mortgage lien to Intervenor herein, Howard Dailey.

6. I find that up to the date of this trial nothing has been paid on said note.

7. I find that on November 20, 1933, J. G. Strong was appointed Receiver for Texas Refinery.

8. I find that at the time of such appointment, to wit, November 20, 1933, the Texas Refinery was insolvent.

9. I find that after said appointment said Receiver sold all of the assets of the said Texas Refinery for $1,618.50.

10. I find that of said sum, $1,618.50, eighty percent was covered by the above-mentioned mortgage, and that of the total proceeds derived, to wit, $1,618.50, the sum of $1,294.80 was derived by the Receiver from the sale of the property covered by the mortgage of September 19, 1933.

11. I find that the Receiver, J. G. Strong, realized from the assets of the Texas Refinery all that could be realized therefrom.

12. I find that J. G. Strong, upon his discharge as Receiver, paid into the registry of this Court a total sum of $7,516.92, and that said sum is now in the registry of this Court, save and except $75.00 which has been paid to the said Receiver for services in connection with the receivership.

110 13. I find that the United States Government has a lien for gasoline taxes and penalty in the sum of $19,343.91, which lien attached after September 19, 1933.

14. I find that the State of Texas has a lien for delinquent motor-fuel taxes, interest, fines, and penalties in the total sum of $42,812.51, less $2,500.00 paid by the Republic Underwriters, Inc., as surety for the Texas Refinery.

15. I find that the lien of the State of Texas, set out above, for the months of October and November 1933, attached after September 19th, 1933.

Conclusions of law

1. The lien now held by Howard Dailey is prior and superior to the liens of the United States and of the State of Texas, and that Howard Dailey should have judgment against W. L. Nix and Texas Refining Company in the sum of $1,294.80, which is eighty percent of the sum of $1,680.50, the price for which the assets of Texas Refinery were sold, together with interest at the rate of 6% per annum upon said amount from March 20, 1938, and that said sum shall be paid out of the proceeds now in the custody of this Court, ahead of and prior to the claim of the United States and the State of Texas.

2. That the United States Government should have judgment for the full amount of its claim, in the sum of $19,343.91, against W. L. Nix, operating as Texas Refinery, and that such lien attached to the property in this receivership, and that such lien should bear interest at the rate of 6% per annum from March 30, 1938, said lien in favor of the United States Government being inferior and subsequent to the lien heretofore decreed to Intervenor, Howard Dailey.

111 3. That the State of Texas should have and recover judgment against W. L. Nix, operating as Texas Refinery, in the sum of $40,312.51, together with interest thereon from March 30, 1938, and that such lien of the State of Texas is inferior and subsequent to the lien of Intervenor, Howard Dailey, and the United States Government.

4. That after the payment of Howard Dailey of the lien herein decreed to him, in the sum of $1,294.80, with interest, that the remainder of the funds now in custody of this Court should be paid to the United States Government.

D. S. MEREDITH, JR.,
Judge.

113 [Clerk's certificate to foregoing transcript omitted in printing.]

272 [File endorsement omitted.]

In Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth

No. 13899

THE STATE OF TEXAS, ET AL., APPELLANTS

vs.

W. L. NIX, ET AL., APPELLEES

From the District Court of Gregg County

Certified questions

Filed April 21, 1939

To the Honorable Supreme Court of Texas:

The appeal pending before this court in the above styled cause grows out of a judgment rendered by the District Court of Gregg County, in favor of Howard Dailey, as intervening plaintiff, against W. L. Nix, in which Dailey was awarded a recovery for a portion of the amount sued for, the establishment of the validity

and priority of his chattel mortgage lien on certain personal property, and the right to have his judgment paid out of certain funds held in the registry of the court. The funds from which payment was ordered were placed in the registry of the court by a previously appointed receiver of the property of the defendant, Nix.

W. L. Nix was, for a time, engaged in the refinery
273 business, under the trade name of Texas Refinery. He manufactured and distributed motor fuel and thereby became liable for the payment of certain taxes thereon to the United States and to the State of Texas. He failed to pay certain of those taxes, and when suit was instituted against him by the original owner of certain notes owing and to foreclose certain chattel mortgage liens previously executed by him to secure their payment, a receiver was appointed, who, under orders of the court, leased the refinery plant for a time and later sold its physical assets. The proceeds coming into the receiver's hands were deposited in the registry of the court.

We believe that the following statement from the entire record will suffice to place before the Court the points involved:

M. R. Ingram sued W. L. Nix, doing business in the trade name of Texas Refinery, and Heartfield Refinery Company, Inc., in a district court of Gregg County, Texas, for recovery on a note in the principal sum of $1,163.49, with interest at 8% per annum from its date along with the usual and customary ten per cent attorney fees, seeking a foreclosure of a chattel mortgage lien on six 250-barrel run down tanks, and one 1,000-barrel storage tank, alleged to be a part of the equipment used in connection with a refinery. The note and mortgage were alleged to have been executed by Heartfield Refining Company, Inc., to plaintiff, on May 11th, 1933, and that the chattel mortgage lien was forthwith filed for record.

274 Further allegations are to the effect that subsequent to the execution and delivery of the note and mortgage, Heartfield Refinery Company, Inc., for a valuable consideration, sold and delivered to defendant, W. L. Nix, the mortgaged property, and that Nix assumed to pay plaintiff said indebtedness evidenced by the note.

Plaintiff's pleadings further show that the indebtedness is past due and unpaid, that demand has been made therefor and that Nix is insolvent. Other allegations state facts which, if true, would authorize the appointment of a receiver for the business operated by Nix.

Prayer was for the debt and foreclosure of the chattel mortgage lien and for a receiver; that a sale of the property by the receiver be ordered and that the proceeds of such sale be applied to the liquidation of plaintiff's debt and for general relief.

After notice, the court heard the application and entered an order appointing a receiver of the business operated by W. L. Nix, in which order, among other things, it is recited: * * * And the plaintiff appearing by counsel and the defendant having appeared, and plaintiff having announced ready on his application, the court having read the verified oath of complaint and hearing the statement and admissions in open court, is of the opinion and finds that the same presents the proper case authorizing the appointment of a receiver, ex parte, and for granting the relief shown in this order." J. G. Strong was appointed receiver, his bond set and his duties defined.

275 The Federal Government, the State of Texas, and R. P. Ash intervened as creditors of W. L. Nix. Ash's claims consisted of two notes secured by chattel mortgages. The first note was for $1,750.00, dated April 27th, 1933, with 8% interest per annum from date and ten percent attorney fees, secured by a chattel mortgage on what was known as the Heartfield Refining Company plant (excepting the part previously mortgaged to plaintiff). Ash's second note was in the sum of $4,651.86, dated September 19th, 1933, with 8% interest per annum from date and attorney fees, secured by a chattel mortgage on one 1,500-barrel capacity Pipe and Still, Water Cooling Tower, Laboratory Building and Equipment, Pipe and Equipment in Water Well, 2,000-barrel capacity bubble tower, Bath house and equipment, Office furniture, typewriter, and filing cabinets. It was alleged these notes were both due and unpaid. Prayer in that intervention was for debt and foreclosure of the lien on the property described.

The State of Texas intervened under its claim for $28,870.16, then due the State by W. L. Nix for taxes, penalty, and interest, on motor fuel manufactured and distributed, upon which the tax had not been paid under Article 7065a, Vernon's Civil Statutes, et seq., and for a foreclosure of its alleged first and preferred lien on all the property of W. L. Nix, including that described in plaintiff's and Ash's alleged chattel mortgages.

The United States, acting by and through W. A. Thomas, Collector of Internal Revenue for the Second District of Texas,
276 intervened, made proof of, and asked for judgment for its debt of $20,907.61, for taxes and penalties due on motor fuels manufactured and sold by Nix, for which no payment had been made. This intervener claimed and asked for a foreclosure of its first and preferred lien on all property of Nix, under and by virtue of Section 3466 of Revised Statutes of the United States, Section 191, Title 31, U. S. C. A.

Thereafter, on January 21st, 1938, Howard Dailey was permitted by the court to intervene, as the sole plaintiff, under allegations that he had acquired all the rights in the subject matter

theretofore held by the original plaintiff, M. R. Ingram, and intervener R. P. Ash. An amended petition was at that time filed by intervener Dailey, alleging the indebtedness and liens acquired by him, largely in the same language previously set out by Ingram and Ash. Further allegations were made that the receiver, theretofore appointed by the court, had, under orders of the court, sold the assets of W. L. Nix, doing business in the name of Texas Refinery, and had turned into the registry of the court, (less costs and expenses incurred) the total sum of $7,466.92.

Prayer was for allowance of his indebtedness, that he be given judgment for the amount, and that his claim and liens be decreed as prior and superior to all others of the parties, whether plaintiff, defendants, or interveners, and that an order be entered directing payment from the funds in the registry of the court, for costs and general relief.

Interveners, United States and the State of Texas, renewed their pleas of intervention in much the same way as in their
277 original pleadings, and further answered and denied that the substituted plaintiff, Dailey, was entitled to the relief sought. Each intervener insisted upon its respective rights and priorities theretofore pleaded.

Upon trial to the court, evidence was heard, about which there is little or no controversy under the issues involved here. Judgment was entered favorable to the intervening plaintiff, Dailey, as well also more favorable to the intervener, United States, than to the State of Texas.

The court found in his judgment that Dailey was the owner of the Ingram note originally sued on and of the two notes owned by Ash at the time of his intervention; that these debts were secured by liens on those parts of the assets of Nix, described in the respective mortgages; that said liens were first and superior as against those asserted by interveners, United States and the State of Texas. There was a further finding that the asserted lien of the United States was prior and superior to that of the State of Texas.

The court further found that the property upon which Dailey held his first and superior lien constituted eighty per cent of all the assets of Nix coming into the hands of the receiver and sold by him; that out of the sum of $7,466.92 then in the registry of the court, so deposited by the receiver, certain parts thereof were the proceeds of operation and leasing of the refinery plant, and that $1,618.50 thereof represented the total sum for which the receiver sold said physical assets, and that said sale was the best that could be obtained by the receiver and had been approved by the court. That by reason of the fact that Daily had a

278 first and superior lien against eighty per cent of said assets, he was entitled to receive from the proceeds of said sale $1,294.80 therefrom, and that the United States having a second lien on said property, it should receive the remainder of said total fund; that said remainder being insufficient to satisfy the United States tax and lien, there was nothing left with which to pay the tax debt and lien of the State. There was a further finding that by agreement of all parties the receiver was entitled to be paid from said fund $75.00 for services rendered, before either plaintiff, Dailey, or the United States should be paid any sum. The decree ordered paid from the fund in the registry of the court, (1) all costs incurred in the suit not previously paid by the receiver, including $75.00 to the receiver; (2) the claim of intervener, Dailey, in the sum of $1,294.80; and (3) the balance to the United States to be applied upon its judgment and claim for taxes. The decree further recites, "Inasmuch as the claim of the United States as allowed, is greater than the amount of money in the hands of the court, there will be nothing left to be applied on the claim of the State of Texas allowed herein."

The intervener, State of Texas, excepted to the rulings of the court. The United States excepted to that part of the judgment giving intervener, Dailey, a preference lien to that of the Federal Government, and both the United States and the State of Texas gave notice of appeal to the Texarkana Court of Civil Appeals. The State of Texas alone perfected the appeal.

279 Both the United States and the State of Texas made proof of their respective claims against Nix for taxes, interest, and penalties due and unpaid. Those of the United States, accruing during the months of May, June, July, August, September, October, and November 1933, aggregated $19,914.81. The States of Texas made proof of taxes, interest, and penalties, to date of trial, due for the months of October and November 1933, in the aggregate sum of $30,797.69.

In entering the judgment, the trial court considered the chattel mortgage liens held by intervening plaintiff, Dailey, to be first and prior to those asserted by each the United States and the State of Texas, and that the lien of United States was first and superior to the rights of the State of Texas.

The United States claimed a first preferred and superior lien under and by virtue of the U. S. Rev. St. Section 3466, Sect. 191, Title 31, U. S. C. A., which reads:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States

shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

In support of its contention that its claim matured into a first and superior lien under the Federal Statute above referred
280 to, the United States relies upon the following authorities: Price vs. U. S., 269 U. S. 492; Hatch vs. Morosco Holding Co., Inc., 61 Fed. (2) 944; Gerson, Beesley & Hampton, Inc. vs. Shubert Theater Corp., 7 Fed. Supp. 399; People of the State of N. Y. vs. Maclay et al., 288 U. S. 290; State of Texas vs. Wynne, 113 S. W. (2d) 325, Churchill vs. Straus Investing Corp., 27 F. S. 316.

The State of Texas claims a first, prior and preferred lien on all the property of the distributor, under Article 7065a, Sect. 7, Vernon's Texas Civil Statutes. The portion of Section 7 relied upon reads, in part, as follows: "All taxes, fines, penalties, and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all the property of the distributor, devoted to or used in his business as a distributor * * *."

The State of Texas further relies upon the holdings of our courts, in support of its contention that it has a first, prior and preferred lien, in numerous cases cited, among which it especially emphasizes: State vs. Bank of Mineral Wells (Tex. Civ. App.) 251 S. W. 1107; Preston vs. Anderson Co. Imp. Dist., 261 S. W. 1077 (writ refused); Kirk vs. City of Gorman (Tex. Civ. App.) 283 S. W. 188; Wood vs. Scott, 48 S. W. (2d) 1024 (writ refused); Childress County vs. State (Sup.) 92 S. W. (2d) 1011.

It is contended by the intervening plaintiff below, appellee here, that Article 7065a, Sect. 7, Vernon's Texas Civ. St., relied upon by the State, insofar as it attempts to confer a first,
281 prior and preferred lien on all personal property of the distributor used in connection with his business, to previously created contract liens, such as held by him, is void as being in violation of the provisions of our State Constitution, Article I, Section 16, and of the United States Constitution, Article I, section 10. Each of which prohibits the passage of ex post facto laws or those which impair the obligation of contracts.

We had before us recently the case of the State of Texas vs. Wynne, reported in 113 S. W. (2d) 325, which involved, among

other things, the questions arising in this appeal. A writ of error was granted by that Honorable Court in that case, and has not yet been reached for consideration.

We have expressed our views in this case, as shown by the accompanying tentative opinion, but in view of the status of the Wynne case, supra, we deem it advisable to certify the issues involved here to that Honorable Court. The questions involved and which we desire to have answered are:

1. Do the provisions of Section 7 of Article 7065a, V. T. C. S., which give to the State of Texas "a preferred lien, first and prior to any and all other existing liens" upon all the property of the distributor, devoted to or used in connection with the business as a distributor, to secure the payment to the State, for all taxes, penalties and interest due the State, under the Motor Fuel Act, violate the provisions of Article I, Section 16, of the State Constitution and Article I, Section 10, of the U. S. Constitution?

282 2. Under the conditions and facts shown in this case, did the trial court commit an error in holding that the claim of the United States for taxes, penalties and interest should be paid out of the funds in the registry of the court before the similar claims of the State of Texas were paid?

IRBY DUNKLIN,
Chief Justice, Court of Civil Appeals
for the Second Supreme Judicial District of Texas.

APRIL 21, 1939.

283 [File endorsement omitted.]

In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

Tentative opinion

Filed April 21, 1939

M. R. Ingram sued W. L. Nix, doing business in the trade name of Texas Refinery, and Heartfield Refinery Company, Inc., in a district court of Gregg County, Texas, for recovery on a note in the principal sum of $1,103.49, with interest at 8% per annum from its date, along with the usual and customary ten-percent attorneys' fees, seeking a foreclosure of a chattel-mortgage lien on six 250-barrel run-down tanks and one 1,000-barrel storage tank, alleged to be a part of the equipment used in connection with

a refinery. The note and mortgage were alleged to have been executed by Heartfield Refinery Co., Inc., to plaintiff on May 11, 1933, and that the chattel-mortgage lien was forthwith filed for record.

Further allegations are to the effect that subsequent to the execution and delivery of the note and mortgage, Heart-
284 field Refinery Co., Inc., for a valuable consideration, sold and delivered to defendant, W. L. Nix, the mortgaged property, and that Nix assumed to pay plaintiff said indebtedness evidenced by the note.

Plaintiff's pleadings further show that the indebtedness is past due and unpaid, that demand has been made therefor, and that Nix is insolvent. Other allegations state facts, which, if true, would authorize the appointment of a receiver for the business operated by Nix.

Prayer was for the debt and foreclosure of the chattel-mortgage li and for a receiver, that a sale of the property by the receiver be ordered, and that the proceeds of such sale be applied to the liquidation of plaintiff's debt and for general relief.

After notice, the court heard the application and entered an order appointing a receiver of the business operated by W. L. Nix, in which order, among other things, it is recited: "* * * And the plaintiff appearing by counsel and the defendant having appeared, and plaintiff having announced ready on his application, the court having read the verified oath of complaint and hearing the statement and admissions in open court, is of the opinion and finds that the same presents the proper case authorizing the appointment of a receiver, ex parte, and for granting the relief shown in this order." J. G. Strong was appointed receiver, his bond set, and his duties defined.

The Federal Government, the State of Texas, and R. P. Ash intervened as creditors of W. L. Nix. Ash's claims
285 consisted of two notes secured by chattel mortgages. The first note was for $1,750, dated April 27, 1933, with 8% interest per annum from date and ten-percent attorneys' fees, secured by a chattel-mortgage lien on what was known as the Heartfield Refining Company plant (excepting the part previously mortgaged to plaintiff). Ash's second note was in the sum of $4,651.86, dated September 19, 1933, with 8% interest per annum from date and attorneys' fees, secured by a chattel mortgage on one 1,500-barrel capacity Pipe and Still, Water Cooling Tower, Laboratory Building and Equipment, Pipe and Equipment in Water Well, 2,000-barrel capacity bubble tower, Bath house and equipment, Office furniture, typewriter and filing cabinets. It was alleged these notes were both due and unpaid.

Prayer in that intervention was for debt and foreclosure of the lien on the property prescribed.

The State of Texas intervened under its claim for $28,870.16 due the State by W. L. Nix for taxes on motor fuel manufactured and sold, upon which the tax had not been paid under Article 7065a Vernon's Civil Statutes, et seq., and for a foreclosure of its alleged first and preferred lien on all the property of W. L. Nix, including that described in plaintiff's and Ash's alleged chattel mortgages.

The United States, acting by and through W. A. Thomas, Collector of Internal Revenue for the Second District of Texas, intervened, made proof of, and asked for judgment for its debt of $20,907.61 for taxes and penalties due on motor fuels manufactured and sold by Nix, for which no payment had been made.

This intervener claimed and asked for a foreclosure of its
286 first and preferred lien on all property of Nix, under and by virtue of Section 3466 of Revised Statutes of the United States, Section 191, Title 31, U. S. C. A.

Thereafter, on January 21, 1938, Howard Dailey was permitted by the court to intervene, as the sole plaintiff, under allegations that he had acquired all the rights in the subject matter theretofore held by the original plaintiff, M. R. Ingram, and intervener R. P. Ash. An amended petition was at that time filed by intervener Dailey alleging the indebtedness and liens acquired by him, largely in the same language previously set out by Ingram and Ash. Further allegations were made that the receiver, theretofore appointed by the court, had, under orders of the court, sold the assets of W. L. Nix, doing business in the name of Texas Refinery, and had turned into the registry of the court (less costs and expenses incurred) the total sum of $7,466.92.

Prayer was for allowance of his indebtedness, that he be given judgment for the amount and that his claim and liens be decreed as prior and superior to all others of the parties, whether plaintiff, defendants, or interveners, and that an order be entered directing payment from the funds in the registry of the court, for costs and general relief.

Interveners United States and the State of Texas renewed their pleas of intervention in much the same way as in their original pleadings, and further answered and denied that the substituted plaintiff Dailey was entitled to the relief sought. Each intervener insisting upon its respective rights and priorities theretofore pleaded.

287 Upon trial to the court, evidence was heard, about which there is little or no controversy under the issues involved here. Judgment was entered favorable to the intervening plaintiff

Dailey as well also more favorable to the intervener United States, than to the State of Texas.

The court found in his judgment that Dailey was the owner of the Ingram note originally sued on and of the two notes owned by Ash at the time of his intervention; that these debts were secured by liens on those parts of the assets of Nix, described in the respective mortgages; that said liens were first and superior as against those asserted by interveners, United States and the State of Texas. There was a further finding that the asserted lien of the United States was prior and superior to that of the State of Texas.

The court further found that the property upon which Dailey held his first and superior lien constituted eighty percent of all the assets of Nix coming into the hands of the receiver and sold by him; that out of the sum of $7,466.92 then in the registry of the court so deposited by the receiver, certain parts thereof were the proceeds of operation and leasing of the refinery plant, and that $1,618.50 thereof represented the total sum for which the receiver sold said physical assets, and that said sale was the best that could be obtained by the receiver and had been approved by the court. That by reason of the fact that Dailey had a first and superior lien against eighty percent of said assets, he was entitled to receive from the proceeds of said sale $1,294.80 therefrom, and that the United States having a second lien on said property, it
288 should receive the remainder of said total fund; that said remainder being insufficient to satisfy the United States tax and lien there was nothing left with which to pay the tax debt and lien of the State. There was a further finding that by agreement of all parties the receiver was entitled to be paid from said fund $75.00 for services rendered, before either plaintiff, Dailey, or the United States should be paid any sum. The decree ordered paid from the fund in the registry of the court, (1) All costs incurred in the suit not previously paid by the receiver, including $75.00 to the receiver. (2) The claim of intervener Dailey in the sum of $1,294.80. And (3) The balance to the United States to be applied upon its judgment and claim for taxes. The decree further recites "Inasmuch as the claim of the United States as allowed, is greater than the amount of money in the hands of the Court, there will be nothing left to be applied on the claim of the State of Texas allowed herein."

The intervener State of Texas excepted to the rulings of the court. The United States excepted to that part of the judgment giving intervener Dailey a preference lien to that of the Federal Government, and both the United States and the State of Texas gave notice of appeal to the Texarkana Court of Civil Appeals.

The State of Texas alone perfected the appeal, and by an equalizing order by our Supreme Court the case is before us for review.

Appellant (State of Texas) presents this appeal upon what we deem two propositions, although subdivided several times. They are (1) The trial court erred in holding that intervener
289 Dailey's claim and lien were superior to that held by the State; and (2) The Court erred in holding that the lien of Intervener United States was superior to that of the State.

In appellant's brief it is said: "Consequently, the sole question for determination is whether or not the evident purpose embodied in Section 7, Article 7065 (a) R. C. S. is to be stricken down as violative of Article 1, Section 16, Constitution of Texas, and Article 1, Section 10, Constitution of the United States."

It is not claimed in this case that the taxes sued for by the State are ad valorem, but are occupation or excise taxes. If they were ad valorem taxes, then another question would arise, not now before us. Article 8, Sect. 15, State Constitution, provides that the annual assessment made upon landed property shall be a special lien thereon; and that all property both real and personal, belonging to a delinquent taxpayer shall be liable to seizure and sale for payment of taxes due.

There is nothing in the record before us in this case, which indicates that any part of the property upon which the tax lien is claimed by the State, was real estate; it is described as personalty. The constitutional provision mentioned does not provide for a lien thereon to secure the payment of delinquent taxes, but only that such property shall be subject to levy and sale therefor. The prior and preference lien asserted here by the State must depend upon the authority of the Legislature to make it such. This was attempted by the Act relied upon here.

290 The Act is contained in Art. 7065a, and at Section 7, among other things, provides: "All taxes, fines, penalties, and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all the property of such distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, etc. * * *."

In support of the State's contention that it has a preferred and prior lien on the personal property of Nix operating as the Texas Refinery, for the occupation or excise tax levied and then due, we are cited to the Act (Article 7065a). State vs. Bank of Mineral Wells (Tex. Civ. App.) 251 S. W. 1107; Preston vs. Anderson

County Levee Improvement Dist., 261 S. W. 1077, writ refused; Kirk vs. City of Gorman (Tex. Civ. App.) 283 S. W. 188; Wood vs. Scott, 48 S. W. (2d) 1024, writ refused; Childress County vs. State (Sup.) 92 S. W. (2d) 1011. In each of those cases except Kirk vs. City of Gorman, the tax for which the lien was claimed to secure, was ad valorem against real estate, and we entertain no doubt as to the correctness of the principle announced in each case, that the State had a preferred and prior lien on the landed property to secure the payment of taxes. And it is likewise well settled that the same rule applies to special taxes on such property when included in Special Districts provided for by the Constitution and laws of the state. The exception among the
291 cases cited above involved an asserted preferens lien on personal property levied upon by the City of Gorman for payment of delinquent taxes. Kirk and Brewer, two of the defendants, claimed a chattel mortgage lien on the personalty, executed prior to the accrual of the taxes and the levy. The debt and lien securing it were barred by the statute of limitations, and it was held the City could interpose that defense as against its tax lien. The court specifically declined to pass upon the question of whether or not the City of Gorman could legally declare by charter, that such a tax lien would be superior to those created by contract before the levy and attempt to collect the tax.

It is earnestly argued by the State that such taxes, as those levied ad valorem, and as occupation or excise, are of equal dignity, since they each go to support and maintain the State in all its sovereign functions. It reasons, that surely the framers of our Constitution did not intend that the Legislature could authorize the levy of a tax, such as the one under consideration, and then leave the State helpless as to a means of enforcing collection; that is, leave it optional with the taxpayer whether or not he would pay, or even permit another with whom he has previously contracted, to prevent the collection of such a tax. It is contended that in view of the vast amount of taxes accruing to the State under the Motor Fuel Act, to strike down the prior and preferred lien clause under Section 7 thereof, would materially affect the taxing powers and revenues of the State derived therefrom.

We do not agree with these contentions. We think the Act a good and wholesome one, essential to the welfare of the
292 State and not unfair to those who desire to bring themselves under it. We also think its provisions, aside from and independent of Section 7, are abundantly sufficient to give each, the State and the operator, every protection needed.

In this connection, a résumé of the provisions of the Act is pertinent. As the law now stands, Article 7065a, Vernon's Tex.

Civ. Statutes, and the several sections thereof, provide in effect: Section 2 imposes an occupation or excise tax of four cents on each gallon of motor fuel manufactured and sold. Section 3. All manufacturers and distributors of motor fuel, desiring to engage in such business, after the law becomes effective, shall make application to the State Comptroller for a permit for that purpose. Section 4. Upon receipt of a proper application and the bond provided for in the Act, the Comptroller will issue the permit. Section 5. Upon violation of any of the provisions of the Act, the Comptroller may forfeit the permit of such distributor. Section 6. Before any permit may issue to a distributor, he must first file the application above mentioned, accompanied by a bond in a sum not less than $1,000 and not to exceed $25,000, conditioned that he will keep and perform all the conditions and requirements of the Act; such bond to be executed by him and one or more good and sufficient Surety Companies authorized by law to do business in this state. Section 7 provides for the first and preferred lien on all property of the distributor, referred to in a previous part of this opinion, and is the part of the Act here in controversy.

Other portions of the Bill provide additional safeguards
293 for the State and distributor relating to the business and need not be enumerated here.

The tax due to the State is collectible on the 20th of each month, and a failure to so pay is a violation of the Act for which various penalties are provided; among which, the permit may be cancelled by the Comptroller, or if the bond previously executed by the distributor is deemed insufficient a new one for an additional amount may be required. For these and other reasons apparent, we do not think the life and effectiveness of the Act is dependent upon a sustaining of the validity of Section 7 which, as stated, provides for the prior and preferred lien on all property of the distributor to secure the payment of the tax. In addition even to the provisions pointed out, a very broad discretion is conferred by the Legislative Act upon the Comptroller to promulgate and enforce rules and regulations in connection with the stated provisions of the law not inconsistent therewith, for its enforcement. It is further declared by the Legislature in passing the bill, that if any section thereof should be held to be in conflict with the Constitution of this State, it shall in no wise affect other parts thereof. We think Section 7 of the Act, applied to the facts in this case, insofar as it attempts to give a prior and preferred lien on all property, including personalty of the distributor, to secure the payment of the tax, is in violation of our State Constitution, Article I, Section 16, which reads:

"No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

294 To the same effect are the provisions of Article I, Section 10, of the Constitution of the United States. Insofar as applicable here it reads: "No State shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, * * *."

The wisdom of such provisions as those quoted, has never been, and we think, will never be successfully attacked. Since the establishment of our government, there has never been a time when individuals were not encouraged to deal with other persons in business in such a way as would emphasize the benefits of business and social relations. These matters have been doubly emphasized in recent years, including the time of the passage of the Motor Fuel Act by our Legislature, when men with idle money have been encouraged to lend it, upon ample security, to business and industry, resulting in the employment of labor. All these noble purposes would be thwarted if, when a lender and borrower, in good faith attempt to enter into such a contract mutually beneficial to accomplish this purpose, our State should thereafter be permitted to pass laws which would impair that contract, with such a disastrous result, as in this case, to confiscate the security taken by the one and given by the other to effectuate the enhancement of industry and society. It cannot be countenanced solely because of a public necessity, for indeed this does not exist, since as we have seen, the State may be amply protected in its taxing rights by an enforcement of the provisions of the law, as written. We do not believe it is incumbent upon the lender, the appellee in this case, to see that the

295 Comptroller enforce the provisions of the Act, to protect the security taken for the loan. This duty rests with the officials whose duty it is to enforce the provisions of the law.

The second complaint made by assignment of error by the State is that the trial court erred in holding that the lien of the United States was prior to that of the State of Texas. If we are correct in our conclusions hereinabove expressed that the State had no prior and preferred lien on the property of the distributor, then what we have said disposes of the second contention made.

The record before us discloses that at the time of the institution of this suit it was alleged, substantially, that W. L. Nix was insolvent and for grounds shown a receiver was asked. Nix appeared at the hearing and made certain "statements and admissions," the nature of which is not disclosed, upon all of which the receiver was appointed. Upon its face this is equivalent to

an act of bankruptcy. In these circumstances it has often been held that the taxes due the Federal Government have a preference over those due a state. Section 3466 U. S. Rev. St., Section 191, 31 U. S. C. A.; Bramwell vs. U. S. Fidelity & Guaranty Co., 269 U. S. 483, 70 L. Ed. 368; United States vs. Butterworth-Judson Corp., 269 U. S. 504, 70 L. Ed. 380; People etc. vs. Maclay, 288 U. S. 290, 77 L. Ed. 754, and many other cases to the same effect.

We had the case of State vs. Wynne (Tex. Civ. App.), 113 S. W. (2d) 325, before us recently and considered there, along with others, the points involved here, and upon the same issues
296 we expressed ourselves as we have in this case. The Supreme Court granted a writ of error and will review that decision. Believing that we correctly decided that case, we see no reason at this time to reach a different conclusion.

Many authorities are cited in the Wynne, supra, case, not specifically pointed out here. We have briefly summarized our views in this tentative opinion.

We believe the trial court correctly decided the case and that its judgment therefore should be affirmed.

JOHN SPEER, *Associate Justice.*

297 In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

Order certifying questions

April 21, 1939

It is ordered that the questions shown in certificate this day filed be, and they are hereby, certified to the Supreme Court for decision, accompanied by the tentative opinion of this court this day filed.

298 [File endorsement omitted.]

In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

Motion of intervener, the United States of America

Filed May 15, 1939

Comes now the United States of America, an Intervener herein, by and through Steve M. King, United States District Attorney; J. L. Backstrom and B. W. Berg, Special Attorneys for the Bu-

reau of Internal Revenue, and moves this Honorable Court to amend or supplement its abstract incorporated with questions certified in the above-styled action to the Supreme Court of Texas on April 21, 1939, to specifically include therein the finding of the Trial Court that the assets of W. L. Nix, operating as the Texas Refinery, were less than the amount of liabilities of said debtor; that from November 20, 1933, the date this proceeding was instituted, to January 21, 1938, the entry of the judgment by the Trial Court that the said W. L. Nix, operating as the Texas Refinery in this receivership proceeding, was and has been at all times insolvent, and for reasons thereof state:

299 That the amount of claims involved are not in dispute; the sole issue is priority in payment from the funds in the registry of the Court. The Government relies upon Section 3466 of the Revised Statutes, Section 191, Title 31, U. S. C. A., which, among other things, declares priority in payment in the event the debtor is insolvent. That whenever the provisions of this Act are invoked and the question of insolvency arises, that fact may be determinative of the issue involved. The Government definitely re[illegible]s upon the finding of insolvency by the Trial Court on January 21, 1938, which has not been modified or reversed, the same being as follows:

"The Court finds that the Receiver, J. G. Strong, realized all that could have been realized from the assets of W. L. Nix, operating as the Texas Refinery, and that such assets are less than the amount of the liabilities of W. L. Nix, operating as the Texas Refinery, and that on November 20, 1933, the date of the institution of this proceedings, and since that date up to the date of this judgment, that W. L. Nix, operating as the Texas Refinery, and this receivership proceedings was and has been at all times insolvent."

In view of the importance of the priority issue here and in similar cases now pending and undecided in the Courts of Texas, and the effect the decision in this case will have as a precedent and guide in future litigation, it is important that the record should be definite and contain a complete analysis of fact

300 and law for the guidance of the Court in definitely determining the issue involved.

That this Intervener respectfully suggests the importance of this finding of the Trial Court for the purpose of allaying any possible misunderstanding on the question of insolvency from the institution of this proceeding in so far as it may enter and control the issue here involved.

That on May 3, 1939, this case was submitted to the Supreme Court of Texas, along with the case of The State of Texas vs.

B. J. Wynne et al., on appeal from the decision of this Court dated January 14, 1938, and the United States of America, as an intervener, was granted fifteen days thereafter in which to seek from this Court an amended or supplemental certificate incorporating the finding of insolvency.

Wherefore, it is respectfully prayed that this motion be granted and that this Honorable Court submit to the Supreme Court of Texas an additional finding as above set forth.

STEVE M. KING,
United States District Attorney,
Beaumont, Texas.
J. L. BACKSTROM,
B. W. BERG,
Special Attorneys for the Bureau of
Internal Revenue, Dallas, Texas.

301 In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

Order amending certified questions

May 16, 1939

This day came on to be heard the motion by Intervener, United States of America, to amend the certificate to the Supreme Court, heretofore filed in this cause, and the said motion having been duly considered by the court is hereby granted, per supplemental certificate this day filed, and the Clerk of this court will forward said supplemental certificate forthwith to the Supreme Court.

302 [File endorsement omitted.]

IN COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

[Title omitted.]

Supplement to certificate

Filed May 16, 1939

To the Honorable Supreme Court of Texas:

In the above styled cause, we submitted to Your Honors certain questions, deemed by us necessary for a determination of the issues involved. One of which questions and its answer will be

affected by whether or not W. L. Nix, doing business as Texas Refinery, was insolvent at the time of the institution of the suit. Our attention has been called to the fact that our certificate is silent on this point. We therefore deem it proper to supplement said certificate in this respect. Immediately preceding the last paragraph on page six, we desire to add:

There is evidence in the record to support the following finding in the judgment rendered by the trial court:

363 "The court finds that the Receiver, J. G. Strong, realized all that could have been realized from the assets of W. L. Nix operating as the Texas Refinery, and that such assets are less than the amount of the liabilities of W. L. Nix operating as the Texas Refinery, and that on November 20, 1933, the date of the institution of this proceedings, and since that date up to the date of this judgment that W. L. Nix, operating as the Texas Refinery and this receivership proceedings was and has been at all times insolvent."

IRBY DUNKLIN,
Chief Justice Court of Civil Appeals,
Second Supreme Judicial District of Texas.

364 [File endorsement omitted.]

In Supreme Court of Texas

[Title omitted.]

Opinion on certified questions

Filed in C. C. A. March 8, 1940

This case is before us on certified questions from the Court of Civil Appeals for the Second District. The statement and certified questions read as follows:

"The appeal pending before this court in the above styled cause grows out of a judgment rendered by the District Court of Gregg County, in favor of Howard Dailey, as intervening plaintiff, against W. L. Nix, in which Dailey was awarded a recovery for a portion of the amount sued for, the establishment of the validity and priority of his chattel mortgage lien on certain personal property, and the right to have his judgment paid out of certain funds held in the registry of the court. The funds from which payment was ordered were placed in the registry of the court by a previously appointed receiver of the property of the defendant, Nix.

"W. L. Nix was, for a time, engaged in the refinery busi-
305 ness, under a trade name of Texas Refinery. He manufactured and distributed motor fuel and thereby became liable for the payment of certain taxes thereon to the United States and to the State of Texas. He failed to pay certain of those taxes, and when suit was instituted against him by the original owner of certain notes owing and to foreclose certain chattel mortgage liens previously executed by him to secure their payment, a receiver was appointed, who, under orders of the court, leased the refinery plant for a time and later sold its physical assets. The proceeds coming into the receiver's hands were deposited in the registry of the court.

"We believe that the following statement from the entire record will suffice to place before the Court the points involved:

"M. R. Ingram sued W. L. Nix, doing business in the trade name of Texas Refinery, and Heartfield Refinery Company, Inc., in a district court of Gregg County, Texas, for recovery on a note in the principal sum of $1,103.49, with interest at 8% per annum from its date along with the usual and customary ten per cent attorney fees, seeking a foreclosure of a chattel mortgage lien on six 250-barrel run down tanks, and one 1,000-barrel storage tank, alleged to be a part of the equipment used in connection with a refinery. The note and mortgage were alleged to have been executed by Heartfield Refining Company, Inc., to plaintiff, on May 11th, 1933, and that the chattel mortgage lien was forthwith filed for record.

306 "Further allegations are to the effect that subsequent to the execution and delivery of the note and and mortgage, Heartfield Refinery Company, Inc., for a valuable consideration, sold and delivered to defendant, W. L. Nix, the mortgaged property, and that Nix assumed to pay plaintiff said indebtedness evidenced by the note.

"Plaintiff's pleadings further show that the indebtedness is past due and unpaid, that demand has been made therefor, and that Nix is insolvent. Other allegations state facts which, if true, would authorize the appointment of a receiver for the business operated by Nix.

"Prayer was for the debt and foreclosure of the chattel mortgage lien and for a receiver; that a sale of the property by the receiver be ordered, and that the proceeds of such sale be applied to the liquidation of plaintiff's debt and for general relief.

"After notice, the court heard the application and entered an order appointing a receiver of the business operated by W. L. Nix, in which order, among other things, it is recited: '* * * And

the plaintiff appearing by counsel and the defendant having appeared, and plaintiff having announced ready on his application, the court having read the verified oath of complaint and hearing the statement and admissions in open court, is of the opinion and finds that the same presents the proper case authorizing the appointment of a receiver, ex parte, and for granting the relief shown in this order.' J. G. Strong was appointed receiver, his bond set, and his duties defined.

307 "The Federal Government, the State of Texas, and R. P. Ash intervened as creditors of W. L. Nix. Ash's claims consisted of two notes secured by chattel mortgages. The first note was for $1,750.00, dated April 27th, 1933, with 8% interest per annum from date and ten per cent attorney fees, secured by a chattel mortgage lien on what was known as the Heartfield Refining Company plant (excepting the part previously mortgaged to plaintiff). Ash's second note was in the sum of $4,651.86, dated September 19th, 1933, with 8% interest per annum from date and attorney fees, secured by a chattel mortgage on one 1,500-barrel capacity Pipe and Still, Water Cooling Tower, Laboratory Building and Equipment, Pipe and Equipment in Water Well, 2,000-barrel capacity bubble tower, Bath house and equipment, Office furniture, typewriter, and filing cabinets. It was alleged these notes were both due and unpaid. Prayer in that intervention was for debt and foreclosure of the lien on the property described.

"The State of Texas intervened under its claim for $28,870.16, then due the State by W. L. Nix for taxes, penalty and interest, on motor fuel manufactured and distributed, upon which the tax had not been paid under Article 7065a, Vernon's Civil Statutes, et seq., and for a foreclosure of its alleged first and preferred lien on all the property of W. L. Nix, including that described in plaintiff's and Ash's alleged chattel mortgage.

"The United States, acting by and through W. A. Thomas, Collector of Internal Revenue for the Second District of Texas,

308 intervened, made proof of and asked for judgment for its debt of $20,907.61, for taxes and penalties due on motor fuels manufactured and sold by Nix, for which no payment had been made. This intervener claimed and asked for a foreclosure of its first and preferred lien on all property of Nix, under and by virtue of Section 3466 of Revised Statutes of the United States, Section 191, Title 31, U. S. C. A.

"Thereafter, on January 21st, 1938, Howard Dailey was permitted by the court to intervene, as the sole plaintiff, under allegations that he had acquired all the rights in the subject matter theretofore held by the original plaintiff, M. R. Ingram, and intervener R. P. Ash. An amended petition was at that time filed by inter-

vener Dailey, alleging the indebtedness and liens acquired by him, largely in the same language previously set out by Ingram and Ash. Further allegations were made that the receiver, theretofore appointed by the court, had, under orders of the court, sold the assets of W. L. Nix, doing business in the name of Texas Refinery, and had turned into the registry of the court (less costs and expenses incurred) the total sum of $7,466.92.

"Prayer was for allowance of his indebtedness, that he be given judgment for the amount and that his claim and liens be decreed as prior and superior to all others of the parties, whether plaintiff, defendants, or interveners, and that an order be entered directing payment from the funds in the registry of the court, for costs and general relief.

"Interveners, United States and the State of Texas, renewed their pleas of intervention in much the same way as in their original pleadings, and further answered and denied that the substi-
309 tuted plaintiff, Dailey, was entitled to the relief sought. Each intervener insisted upon its respective rights and priorities theretofore pleaded.

"Upon trial to the court, evidence was heard about which there is little or no controversy under the issues involved here. Judgment was entered favorable to the intervening plaintiff, Dailey, as well also more favorable to the intervener, United States, than to the State of Texas.

"The court found in his judgment that Dailey was the owner of the Ingram note originally sued on and of the two notes owned by Ash at the time of his intervention; that these debts were secured by liens on those parts of the assets of Nix, described in the respective mortgages; that said liens were first and superior as against those asserted by interveners, United States and the State of Texas. There was a further finding that the asserted lien of the United States was prior and superior to that of the State of Texas.

"The court further found that the property upon which Dailey held his first and superior lien constituted eighty percent of all the assets of Nix coming into the hands of the receiver and sold by him; that out of the sum of $7,466.92 then in the registry of the court, so deposited by the receiver, certain parts thereof were the proceeds of operation and leasing of the refinery plant, and that $1,618.50 thereof represented the total sum for which the receiver sold said physical assets, and that said sale was the best that could be obtained by the receiver and had been approved by the court That by reason of the fact that Daily had a first and superior lien against eighty percent of said assets, he was entitled
310 to receive from the proceeds of said sale $1,294.80 therefrom,

and that the United States having a second lien on said property, it should receive the remainder of said total fund; that said remainder being insufficient to satisfy the United States tax and lien, there was nothing left with which to pay the tax debt and lien of the State. There was a further finding that by agreement of all parties the receiver was entitled to be paid from said fund $75.00 for services rendered, before either plaintiff, Dailey, or the United States should be paid any sum. The decree ordered paid from the fund in the registry of the court, (1) all costs incurred in the suit not previously paid by the receiver, including $75.00 to the receiver; (2) the claim of intervener, Dailey, in the sum of $1,294.80; and (3) the balance to the United States to be applied upon its judgment and claim for taxes. The decree further recites, 'Inasmuch as the claim of the United States as allowed, is greater than the amount of money in the hands of the court, there will be nothing left to be applied on the claim of the State of Texas allowed herein.'"

In a supplement to the certificate, the Court of Civil Appeals added the following statement:

"There is evidence in the record to support the following finding in the judgment rendered by the trial court:

"'The court finds that the Receiver, J. G. Strong, realized all that could have been realized from the assets of W. L. Nix operating as the Texas Refinery, and that such assets are less than the amount of the liabilities of W. L. Nix operating as the Texas Refinery, and that on November 20, 1933, the date of the institution of this
311 proceedings, and since that date up to the date of this judgment that W. L. Nix, operating as the Texas Refinery and this receivership proceedings was and has been at all times insolvent.'"

Continuing with the original statement:

"The intervener, State of Texas, excepted to the rulings of the court. The United States excepted to that part of the judgment giving intervener, Dailey, a preference lien to that of the Federal Government, and both the United States and the State of Texas gave notice of appeal to the Texarkana Court of Civil Appeals. The State of Texas alone perfected the appeal.

"Both the United States and the State of Texas made proof of their respective claims against Nix for taxes, interest and penalties due and unpaid. Those of the United States, accruing during the months of May, June, July, August, September, October and November 1933, aggregated $19,914.81. The State of Texas made proof of taxes, interest and penalties to date of trial, due for the months of October and November 1933, in the aggregate sum of $30,797.69.

"In entering the judgment, the trial court considered the chattel mortgage liens held by intervening plaintiff, Dailey, to be first and prior to those asserted by each the United States and the State of Texas, and that the lien of United States was first and superior to the rights of the State of Texas.

"The United States claimed a first preferred and superior lien under and by virtue of the U. S. Rev. St. Section 3466, Sect. 191, Title 31, U. S. C. A., which reads:

312 "'Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.'

"In support of its contention that its claim matured into a first and superior lien under the Federal Statute above referred to, the United States relies upon the following authorities: Price vs. U. S., 269 U. S. 492; Hatch vs. Morosco Holding Co., Inc., 61 Fed. (2) 944; Gerson, Beesley & Hampton, Inc., vs. Shubert Theater Corp., 7 Fed. Supp. 399; People of the State of N. Y. v. Maclay et al., 288 U. S. 290; State of Texas vs. Wynne, 113 S. W. (2d) 325; Churchill vs. Straus Investing Corp., 27 F. S. 316.

"The State of Texas claims a first, prior and preferred lien on all the property of the distributor, under Article 7065a, Sect. 7, Vernon's Texas Civil Statutes. The portion of Section 7 relied upon reads, in part, as follows: 'All taxes, fines, penalties, and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the
313 time such liens originated, upon all the property of the distributor, devoted to or used in his *business* as a distributor * * *.'

"The State of Texas further relies upon the holdings of our courts, in support of its contention that it has a first, prior and preferred lien, in numerous cases cited, among which it especially emphasizes: State vs. Bank of Mineral Wells (Tex. Civ. App.) 251 S. W. 1107; Preston vs. Anderson Co. Imp. Dist., 261 S. W. 1077 (writ refused); Kirk vs. City of Gorman (Tex. Civ. App.) 283 S. W. 188; Wood vs. Scott, 48 S. W. (2d) 1024 (writ refused); Childress County vs. State (Sup.) 92 S. W. (2d) 1011.

"It is contended by the intervening plaintiff below, appellee here, that Article 7065a, Sect. 7, Vernon's Texas Civ. St., relied upon by the State, in so far as it attempts to confer a first, prior and preferred lien on all personal property of the distributor used in connection with his business, to previously created contract liens, such as held by him, is void as being in violation of the provisions of our State Constitution, Article I, Section 16, and of the United States Constitution, Article I, Section 10. Each of which prohibits the passage of ex post facto laws or those which impair the obligation of contracts.

"We had before us recently the case of the State of Texas vs. Wynne, reported in 113 S. W. (2d) 325, which involved, among other things, the questions arising in this appeal. A writ of error was granted by that Honorable Court in that case, and has not yet been reached for consideration.

314 "We have expressed our views in this case, as shown by the accompanying tentative opinion, but in view of the status of the Wynne Case, supra, we deem it advisable to certify the issues involved here to that Honorable Court. The questions involved and which we desire to have answered are:

"1. Do the provisions of Section 7 of Article 7065a, V. T. C. S., which give to the State of Texas 'a preferred lien, first and prior to any and all other existing liens' upon all the property of the distributor, devoted to or used in connection with the business as a distributor, to secure the payment to the State, for all taxes, penalties and interest due the State, under the Motor Fuel Act, violate the provisions of Article I, Section 16, of the State Constitution and Article I, Section 10, of the U. S. Constitution?

"2. Under the conditions and facts shown in this case, did the trial court commit an error in holding that the claim of the United States for taxes, penalties and interest should be paid out of the funds in the registry of the court before the similar claims of the State of Texas were paid?"

For the reasons given in an opinion handed down by this Court on this date in the case of State of Texas vs. B. J. Wynne et al., — S. W. (2d) —, we answer Question No. 1 "No." and Question No. 2 "Yes."

JOHN H. SHARP,
Associate Justice.

Opinions Delivered December 6, 1939.

315 [Clerk's certificate to foregoing paper omitted in printing.]

In Supreme Court of Texas

No. 7574

THE STATE OF TEXAS, ET AL.

vs.

W. L. NIX, ET AL.

Certified Question from Gregg County, 2nd Dist.

Judgment

December 6, 1939

It is ordered by the Court that the opinion herein delivered, answering the Certified Questions, be certified to the Court of Civil Appeals for the Second Supreme Judicial District, and that said cause be therein proceeded with in accordance with said opinion.

[Clerk's certificate to foregoing paper omitted in printing.]

317 In Court of Civil Appeals for the
Second Supreme Judicial District of Texas

13899

THE STATE OF TEXAS ET AL.

vs.

W. L. NIX ET. AL.

From the District Court of Gregg County

Judgment

March 15, 1940

This cause came on to be heard on the transcript of the record, and the same being inspected, it is the opinion of the court that there was error in the judgment. It is therefore, ordered, adjudged, and decreed that the judgment of the trial court be and it is hereby reversed and judgment here rendered, as should have been rendered by the trial court, as follows, in accordance with the answers of the Supreme Court to certified questions:

First, that the plaintiff (intervener) Howard Dailey, take nothing, by reason of this suit, and that the funds in the registry of the trial court be applied first to the payment of all costs not previously paid by the receiver, including the costs incurred in this

court and in the Supreme Court on certified questions, and $75.00 stipulated to be due said receiver, J. G. Strong, for additional services rendered by him;

Second, judgment is here rendered for the appellant, The State of Texas, against all parties, to the extent of the amount remaining in the registry of said trial court, after payment of the costs as above ordered, to be applied to the payment of the tax shown to be due said State of Texas.

It is further ordered that this decision be certified below for observance.

(Recorded Vol. 15, Page 365, Minutes of Court of Civil Appeals Second Supreme Judicial District of Texas.)

318 [File endorsement omitted.]

In Court of Civil Appeals for the Second Supreme Judicial District of Texas

No. 13899

THE STATE OF TEXAS, ET AL., APPELLANTS

vs.

W. L. NIX, ET AL., APPELLEES

From the District Court of Gregg County

Opinion

Filed March 15, 1940

M. R. Ingram sued W. L. Nix, doing business in the trade name of Texas Refinery, and Heartfield Refinery Company, Inc., in a district court of Gregg County, Texas, for recovery on a note in the principal sum of $1,103.49, with interest at eight per cent per annum from its date, along with the usual and customary ten per cent attorney's fees, seeking a foreclosure of a chattel mortgage lien on six 250-barrel run down tanks, and one 1,000-barrel storage tank, alleged to be a part of the equipment used in connection with a refinery. The note and mortgage were alleged to have been executed by Heartfield Refining Com-
319 pany, Inc., to plaintiff on May 11th, 1933, and that the chattel mortgage lien was forthwith filed for record.

Further allegations are to the effect that subsequent to the execution and delivery of the note and mortgage, Heartfield Refinery Company, Inc., for a valuable consideration, sold and

delivered to defendant, W. L. Nix, the mortgaged property, and that Nix assumed to pay plaintiff said indebtedness evidenced by the note.

Plaintiff's pleadings further show that the indebtedness is past due and unpaid, that demand has been made therefor and that Nix is insolvent. Other allegations state facts which, if true, would authorize the appointment of a receiver for the business operated by Nix.

Prayer was for the debt and foreclosure of the chattel mortgage lien and for a receiver; that a sale of the property by the receiver be ordered and that the proceeds of such sale be applied to the liquidation of plaintiff's debt and for general relief.

After notice, the court heard the application and entered an order appointing a receiver of the business operated by W. L. Nix, in which order, among other things, it is recited: "* * * And the plaintiff appearing by counsel and the defendant having appeared, and plaintiff having announced ready on his application; the court having read the verified oath of complaint and hearing the statement and admissions in open court, is of the opinion and finds that the same presents the proper case authorizing the appointment of a receiver, ex parte, and for granting the relief shown in this order." J. G. Strong was appointed receiver,
320 his bond set and his duties defined.

The federal government, the State of Texas, and R. P. Ash intervened as creditors of W. L. Nix. Ash's claims consisted of two notes secured by chattel mortgages. The first note was for $1,750, dated April 27th, 1933, with eight per cent interest per annum from date, and ten per cent attorney's fees, secured by a chattel mortgage lien on what was known as the Heartfield Refining Company plant (excepting the part previously mortgaged to plaintiff). Ash's second note was in the sum of $4,651.86, dated September 19th, 1933, with eight per cent interest per annum from date and attorney's fees, secured by a chattel mortgage on one 1,500-barrel capacity Pipe and Still, Water Cooling Tower, Laboratory Building and Equipment, Pipe and Equipment in Water Well, 2,000-barrel capacity bubble tower, Bath house and equipment, Office furniture, typewriter and filing cabinets. It was alleged these notes were both due and unpaid. Prayer in that intervention was for debt and foreclosure of the lien on the property described.

The State of Texas intervened under its claim for $28,870.16, due the State by W. L. Nix for taxes on motor fuel manufactured and sold, upon which the tax had not been paid under Article 7065a Vernon's Civil Statutes, et seq., and for a foreclosure of its alleged first and preferred lien on all the property of W. L. Nix,

including that described in plaintiff's and Ash's alleged chattel mortgages.

The United States, acting by and through W. A. Thomas,
321 Collector of Internal Revenue for the Second District of Texas, intervened, made proof of and asked for judgment for its debt of $20,907.61 for taxes and penalties due on motor fuels manufactured and sold by Nix, for which no payment had been made. This intervener claimed and asked for a foreclosure of its first and preferred lien on all property of Nix, under and by virtue of Section 3466 of Revised Statutes of the United States, Section 191, Title 31, U. S. C. A.

Thereafter, on January 21st, 1938, Howard Dailey was permitted by the court to intervene, as the sole plaintiff, under allegations that he had acquired all the rights in the subject matter theretofore held by the original plaintiff, M. R. Ingram, and intervener, R. P. Ash. An amended petition was at that time filed by intervener Dailey, alleging the indebtednesses and liens acquired by him, largely in the same language previously set out by Ingram and Ash. Further allegations were made that the receiver, theretofore appointed by the court, had, under orders of the court, sold the assets of W. L. Nix, doing business in the name of Texas Refinery, and had turned into the registry of the court (less costs and expenses incurred) the total sum of $7,466.92.

Prayer was for allowance of his indebtedness, that he be given judgment for the amount and that his claim and liens be decreed as prior and superior to all others of the parties, whether plaintiff, defendants or interveners, and that an order be entered directing payment from the funds in the registry of the court, for costs and general relief.

322 Interveners, United States and the State of Texas, renewed their pleas of intervention in much the same way as in their original pleadings, and further answered and denied that the substituted plaintiff, Dailey, was entitled to the relief sought. Each intervener insisting upon its respective rights and priorities theretofore pleaded.

Upon trial to the court, evidence was heard, about which there is little or no controversy under the issues involved here. Judgment was entered favorable to the intervening plaintiff, Dailey, as well also more favorable to the intervener, United States, than to the State of Texas.

The court found in his judgment that Dailey was the owner of the Ingram note originally sued on and of the two notes owned by Ash at the time of his intervention; that these debts were secured by liens on those parts of the assets of Nix, described

in the respective mortgages; that said liens were first and superior as against those asserted by interveners, United States and the State of Texas. There was a further finding that the asserted lien of the United States was prior and superior to that of the State of Texas.

The court further found that the property upon which Dailey held his first and superior lien constituted eighty per cent of all the assets of Nix coming into the hands of the receiver and sold by him; that out of the sum of $7,466.92 then in the registry of the court, so deposited by the receiver, certain parts thereof were the proceeds of operation and leasing of the refinery plant, and that $1,618.50 thereof represented the total sum for which
323 the receiver sold said physical assets, and that said sale was the best that could be obtained by the receiver and had been approved by the court. That by reason of the fact that Dailey had a first and superior lien against eighty per cent of said assets, he was entitled to receive from the proceeds of said sale $1,294.80 therefrom, and that the United States having a second lien on said property, it should receive the remainder of said total fund; that said remainder being insufficient to satisfy the United States tax and lien, there was nothing left with which to pay the tax debt and lien of the State. There was a further finding that by agreement of all parties the receiver was entitled to be paid from said fund $75.00 for services rendered, before either plaintiff, Dailey, or the United States should be paid any sum. The decree ordered paid from the fund in the registry of the court, (1) all costs incurred in the suit not previously paid by the receiver, including $75.00 to the receiver; (2) the claim of intervener Dailey in the sum of $1,294.80; and (3) the balance to the United States to be applied upon its judgment and claim for taxes. The decree further recites: "Inasmuch as the claim of the United States as allowed, is greater than the amount of money in the hands of the court, there will be nothing left to be applied on the claim of the State of Texas allowed herein."

The intervener, State of Texas, excepted to the rulings of the court. The United States excepted to that part of the judgment giving intervener Dailey a preference lien to that of the federal government, and both the United States and the State of
324 Texas gave notice of appeal to the Texarkana Court of Civil Appeals. The State of Texas alone perfected the appeal, and by an equalizing order by our Supreme Court, the case is before us for review.

Appellant (State of Texas) presents this appeal, upon what we deem two propositions, although subdivided several times. They are (1) the trial court erred in holding that intervener Dailey's claim and lien were superior to that held by the State; and (2) the court erred in holding that the lien of intervener, United States, was superior to that of the State.

In appellant's brief it is said: "Consequently, the sole question for determination is whether or not the evident purpose embodied in Section 7, Article 7065 (a) R. C. S. is to be stricken down as violative of Article 1, Section 16, Constitution of Texas, and Article 1, Section 10, Constitution of the United States."

It is not claimed in this case that the taxes sued for by the State are ad valorem, but are occupation or excise taxes. If they were ad valorem taxes, then another question would arise, not now before us. Article 8, Section 15, State Constitution, provides that the annual assessment made upon landed property shall be a special lien thereon; and that all property, both real and personal, belonging to a delinquent taxpayer, shall be liable to seizure and sale for payment of taxes due.

There is nothing in the record before us in this case which indicates that any part of the property upon which the tax lien is claimed by the State was real estate; it is described
325 as personalty. The constitutional provisions mentioned does not provide for a lien thereon to secure the payment of delinquent taxes, but only, that such property shall be subject to levy and sale therefor. The prior and preference lien asserted here by the State must depend upon the authority of the Legislature to make it such. This was attempted by the Act relied upon here.

The Act is contained in Art. 7065a, and at Section 7, among other things, provides: "All taxes, fines, penalties, and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all the property of such distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, etc. * * *."

It is earnestly argued by the State that such taxes, as those levied ad valorem, and as occupation or excise, are of equal dignity, since they each go to support and maintain the State in all its sovereign functions. It reasons, that surely the framers of our Constitution did not intend that the Legislature could authorize the levy of a tax, such as the one under consideration, and then

leave the State helpless as to a means of enforcing collection: that is, leave it optional with the taxpayer whether or not he would pay, or even permit another with whom he has previously contracted, to prevent the collection of such a tax. It is contended that in view of the vast amount of taxes accruing to the State under the Motor Fuel Act, to strike down the prior and preferred lien clause under
326 Section 7 thereof would materially affect the taxing powers and revenues of the State derived therefrom.

In view of the contentions made by the State, we certified to the Supreme Court the two points involved. In response to our certificate, that Court answered our questions, in effect, as follows: 1. That the provisions of Section 7, Article 7065a, V. T. C. S. giving to the State a preferred lien, first and prior to all other existing liens upon all the property of the distributor, used in the business, to secure the payment to the State for the tax, did not violate the provisions of Article 1, Section 16, of our State Constitution. 2. That the trial court erred in holding that the claim of the United States for taxes, penalties and interest should be paid out of the funds in the registry of the court, before the similar claims of the State of Texas were paid. See opinion by Supreme Court, State, et al. vs. Nix, et al., 133 S. W. (2d) 963.

The record discloses that all facts necessary to a determination of the rights of the several parties were thoroughly developed at the trial, and no necessity exists for further findings. Upon authority of the expressions found in the last above cited case and that of State vs. Wynne, et al., 133 S. W. (2d) 951, referred to by the Supreme Court in the Nix case, supra, the judgment of the trial court is reversed and here rendered that plaintiff take nothing and that the funds in the registry of the court be applied first to the payment of all costs not previously paid by the receiver and $75.00 stipulated to be due him for additional services rendered; and second, that the State of Texas have judgment
327 against all parties to the extent of the remaining amount in the court's hands, to be applied to the payment of the tax shown to be due it. Obviously there will be nothing left in the fund for payment to any other party. But under the holding in the Wynne case, supra, the classification of the respective claims would be that of the State of Texas, first, that of valid lien holders, second, and the claim of the United States, third. Judgment of the trial court is therefore reversed and here rendered, as above indicated.

JOHN SPEER,
Associate Justice.

328 In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

Motion for rehearing

Filed March 27, 1940

To the Honorable Justices of the Court of Civil Appeals for the Second Supreme Judicial District of Texas:

Comes now the United States of America, one of the intervenors in the above entitled and numbered cause, and moves this Honorable Court to set aside the judgment and decision entered herein on March 15, 1940, and to grant this intervenor a rehearing herein, and in support thereof says as follows:

1. This Honorable Court erred in rendering judgment in favor of the State of Texas against the United States of America, to the extent of the remaining amount of money in the
329 Court's hands, after the payment of all unpaid costs.

2. This Honorable Court erred in holding that the claim of the State of Texas is entitled to payment prior to the claim of the United States of America.

3. This Honorable Court erred in not classifying the claim of the United States of America herein as being entitled to priority over the claim of the State of Texas herein.

Wherefore, the United States of America prays that this Honorable Court grant it a rehearing herein, that its opinion and judgment entered on March 15, 1940, be set aside, and that the United States of America be granted a rehearing herein, and render judgment to the effect that the claim of the United States of America should be paid out of the funds in the Registry of the Court before the similar claim of the State of Texas is paid.

STEVE M. KING,
United States Attorney.
JOHN D. RIENSTRA,
Assistant U. S. Attorney.

330 In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

Order overruling motion for rehearing

April 12, 1940

This day came on to be heard the motion in behalf of the United States of America for a rehearing in this cause, and the same having been duly considered by the court is hereby overruled.

335 [File endorsement omitted.]

338 In Supreme Court of Texas at Austin

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

THE STATE OF TEXAS ET AL., DEFENDANTS IN ERROR

Application for writ of error on behalf of the United States of America, in cause No. 13899, in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, wherein the State of Texas and valid lien holders are the adverse parties

Filed May 14, 1940

To the Supreme Court of Texas:

Your Petitioner, United States of America, respectively represents that in the above styled cause, on the 15th day of March 1940, the Court of Civil Appeals for the Second Supreme Judicial District of Texas, rendered its opinion, holding that the classification of the respective claims herein would be that of the State of Texas first, that of the valid lien holders second, and the claim of the United States third, and reversing the judgment of the trial Court and rendering judgment as above indicated. Thereafter, in due time your Petitioner filed its motion for rehearing in said Court of Civil Appeals, praying that the judgment of said Court of March 15, 1940, be vacated and set aside, and that judgment be rendered to the effect that the claim of the United States of America should be paid out of the funds in the Registry of the trial Court before the payment of the similar claim of the State of Texas. Said motion for rehearing was thereafter, on the 12th day of April 1940, overruled and denied, and said judgment of the Court of Civil Appeals of March 15, 1940, thereupon became final.

339 PRELIMINARY STATEMENT

This suit originated in the District Court of Gregg County, Texas, being an action by M. R. Ingram against W. L. Nix for recovery on a note in the principal sum of $1,103.49, together with interest and attorneys' fees, and the foreclosure of a chattel mortgage lien on certain described refinery equipment. Prayer was for the debt and foreclosure of the chattel mortgage lien, and for the appointment of a receiver, for the sale of the property by the receiver, and that the proceeds be applied to the liquidation of Ingram's debt. A receiver was appointed, and thereafter your Petitioner, the United States of America, the State of Texas, and

other creditors intervened, claiming liens upon the refinery equipment and other assets belonging to W. L. Nix.

The State of Texas intervened under its claim for $28,870.16, due it by Nix for taxes on motor fuel manufactured and sold, upon which the tax had not been paid under Article 7065a, Vernon's Civil Statutes et seq., and for a foreclosure of its alleged first and preferred lien on all the property of W. L. Nix, including that described in Plaintiff's chattel mortgage.

The United States of America intervened, and made proof of and asked for judgment for its debt of $20,907.61, for taxes and penalties due on motor fuels manufactured and sold by Nix, for which no payment had been made. The United States of America claimed and asked for a foreclosure of its first and preferred lien on all property of Nix, under and by virtue of Section 3466 of Revised Statutes of the United States, Title 31, Section 191, U. S. C. A. The United States of America claimed that the provisions of said Section 3466 were applicable and entitle it to priority over all claims because of the fact, which was later established, that W. L. Nix was insolvent.

Thereafter, on January 21, 1938, Howard Dailey was permitted to intervene, as the sole Plaintiff, under allegations that he had acquired all of the rights and interests of the original Plaintiff, Ingram, and the
340 intervener R. P. Ash. Interveners, United States of America and the State of Texas, renewed their pleas of intervention, and further answered and denied that the substituted Plaintiff, Dailey, was entitled to the relief sought.

Upon a trial to the Court, said Court entered judgment that the liens of Dailey were first and superior as against those asserted by the United States of America and the State of Texas, and that the asserted lien of the United States was prior and superior to that of the State of Texas. Judgment was accordingly entered that out of the sum of $7,466.92, then in the Registry of the Court, (1) $75.00 was to be paid to the receiver for his services; (2) all costs incurred in the suit not previously paid were to be paid; (3) the claim of Dailey, in the sum of $1,294.80, was next to be paid; (4) the balance of said sum was to be paid to the United States of America, to be applied upon its judgment and claim for taxes. The judgment further recited that "inasmuch as the claim of the United States, as allowed, is greater than the amount of money in the hands of the Court, there will be nothing left to be applied on the claim of the State of Texas allowed herein."

The State of Texas excepted to the ruling of the Court and perfected its appeal to the Texarkana Court of Civil Appeals, and by an equalizing order by the Supreme Court, the case was trans-

ferred to the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Thereafter, the Court of Civil Appeals for the Second Supreme Judicial District of Texas certified to the Supreme Court of Texas two questions, accompanied by a statement of the nature of the litigation, which is substantially as stated above. The questions so certified were:

"1. Do the provisions of Section 7 of Article 7065a, V. T. C. S., which give to the State of Texas 'a preferred lien, first and prior to any and all other existing liens' upon all the property of the distributor, devoted to or used in connection with the business as a distributor, to secure the payment to the State, for all
341 taxes, penalties, and interest due the State, under the Motor Fuel Act, violate the provisions of Article I, Section 16, of the State constitution and Article I, Section 10, of the U. S. Constitution?

"2. Under the conditions and facts shown in this case, did the trial court commit an error in holding that the claim of the United States for taxes, penalties and interest should be paid out of the funds in the registry of the court before the similar claims of the State of Texas were paid?"

Thereafter, on December 6, 1939, the Supreme Court of Texas delivered its opinion upon said certified questions, wherein it is stated by the Supreme Court of Texas that "for the reasons given in an opinion handed down by this Court on this date in the case of State of Texas vs. B. J. Wynne, et al. — S. W. (2d) —, we answer question Number One 'no' and question Number Two 'yes.'" Thereafter, in due time, your Petitioner, the United States of America, filed its motion for rehearing before the Honorable Supreme Court of Texas, which motion for rehearing was, on March 6, 1940, overruled. In due time, the answers of the Supreme Court of Texas to such certified questions were certified to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and, as heretofore stated, on March 15, 1940, the said Court of Civil Appeals handed down its decision classifying the respective claims in the following order:

(1) That of the State of Texas.
(2) That of the valid lien holders.
(3) That of the United States of America.

Thereafter, in due time, your Petitioner, United States of America, filed its motion for rehearing with the Court of Civil Appeals, and on April 12, 1940, said motion for rehearing on behalf of the United States was overruled.

342 The claim of priority asserted by the United States of America is based upon the provisions of Section 3466 of

the Revised Statutes of the United States, Title 31, Section 191, U. S. C. A., which reads as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

There was an expressed finding by the trial Court, and by the Court of Civil Appeals, that W. L. Nix, on and subsequent to November 20, 1933, was and had been at all times insolvent.

The foregoing statement is undisputed, as shown by the certificate of the Court of Civil Appeals to the Supreme Court of Texas, and as shown by the opinion of said Court of Civil Appeals rendered on March 15, 1940. It is the contention of the United States of America, Petitioner herein, that its claim for taxes due by W. L. Nix is, under the provisions of the above quoted Section 3466, Revised Statutes of the United States, entitled to priority over the claim of the State of Texas. It was so held by the trial Court, but as heretofore stated, the Court of Civil Appeals, in its opinion herein rendered on March 15, 1940, held that the claim of the State of Texas was entitled to priority over the claim of the United States of America. The question at issue was, therefore, first decided against the United States of
343 America in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the error of said Court of Civil Appeals in so holding was assigned and presented to said Court of Civil Appeals in your Petitioner's motion for rehearing, which was duly and timely filed.

344 STATEMENT OF GROUNDS OF JURISDICTION AND QUESTIONS DECIDED

I

Generally.—The Court of Civil Appeals in reversing the judgment of the trial court and rendering judgment as above indicated held that the United States of America was not entitled to prior payment of its claim before the payment of the claim of the State of Texas. This case is one in which the jurisdiction of the Court of Civil Appeals is not final. The matter within

the jurisdiction of this Court is presented under Subdivision 6, Article 1728, Revised Civil Statutes of Texas, as amended.

II

The ruling of the Court of Civil Appeals is prejudicial to the right of your Petitioner in that an error of substantive law was committed by said court which was material to the decision in this case and substantially affected the judgment rendered by the Court of Civil Appeals herein.

As pointed out in the preliminary statement, the decision of the Court of Civil Appeals rendered on March 15, 1940, and of which complaint is here made, was predicated upon the answers of this Honorable Court to certified questions submitted in this case. This Honorable Court, for the reasons stated in an opinion handed down on the same date in the case of State of Texas vs. B. J. Wynne, et al., bearing Docket No. 7464 in this Honorable Court, held that the trial court in the instant case committed error in adjudging the claim of the United States of America to be superior to the claim of the State of Texas. Therefore, the Court of Civil Appeals in the instant case, relying upon State of Texas vs. Wynne, et al., 133 S. W. (2d) 951, and the answers to the certified questions, rendered its decision herein on March 15, 1940, of which complaint is made.

As we understand the opinion of this Honorable Court in the Wynne case, this court held that the claim of the United States would have to be ranked inferior to the claim of the State of Texas, since it was unquestioned that the claim of the State of Texas was superior to the lien claims, and it was likewise
345 unquestioned that the valid lien claims were superior to the claim of the United States. This appears from the following language used by this court in the Wynne case:

"Under the decisions of the Federal courts, bona fide transfers of property and valid liens held by mortgagees, in existence at the time the tax is due the United States, shall be superior to the claim of the United States; and such liens take precedence over the claim of the United States under the Federal statutes just cited. Counsel for the United States concede this. The State has declared that its claim is prior to all other claims. The United States recognizes certain rights as being prior to its claim. At most, the claim of the United States is second. But it is contended that the claim of the United States should be ranked prior to the claim of the State. Such reasoning would make the claim of the state third in rank and would place the claims of

the United States and the lienholders prior to the claim of the State. In order to give the United States precedence over the State in this case, this Court would be compelled to hold, in construing Section 7 of Article 7065a, that the claims held by the State thereunder should be inferior to those of lienholders and the claim of the United States. Such a holding would absolutely nullify that Section and destroy the clear intention of the Legislature expressed therein."

It is the Petitioner's contention that the ultimate holding of this Honorable Court does not follow from the situation described by this Court in the above extract from its opinion. This Court's attention is directed to the case of Spokane County vs. United States, 279 U. S. 80; in that case Chief Justice Taft thoroughly reviewed the various decisions of the United States Supreme Court and held that the United States was entitled to have its claim for taxes paid before a similar claim for taxes on behalf of the County of Spokane, Washington, was paid. In that case the County of Spokane made the identical contention which this Honorable Court follows in the above quoted excerpt from the opinion. In said case of Spokane County vs. United States at Page 91 of 279 U. S. the following language is used by Chief Justice Taft:

"Petitioners rely on Ferris v. Chic-Mint Gum Co., 14 Del. Ch. 232, where there were several claimants—a mortgagee, the State, and the United States. Under R. S. 3186, the mortgagee was given priority over the United States. By state law, the State was preferred to the mortgagee. The Chancellor allowed the claims in the order of the State, the mortgagee, and the United States, holding that "when the Government agreed by Section 3186 to take rank after the mortgagee, it must necessarily follow that it is subordinate in rank to those who are superior to its immediate senior." The Chancellor observed that his conclusion arose out of the peculiar facts of the case, and that it was unnecessary for him to venture into the broad field of constitutional law. Without concurring in the conclusion of the Chancellor, it is enough to say that, as there is no such third creditor here, the case is not in point. Moreover, it is contended by the Government that the relative priorities could have been maintained in that case by setting apart sufficient funds to pay the mort-
346 gage before paying the federal taxes and then providing for payment of the state tax out of the sum so set apart."

It will be noted that the Chief Justice states that no third creditor was involved in that case. But without question the Chief Justice recognizes the validity of the contention made by the Government

that the priorities could be maintained by setting apart sufficient funds to pay the mortgage before paying the Federal taxes and then providing for the payment of the State tax out of the sum set apart to pay the mortgage. Applying said language to the instant case, the Court could set aside the sum of $1,294.80 for the benefit of the valid lien holders whose liens were superior to the claim of the United States, then pay the balance of the fund on deposit to the United States of America, and then provide for the payment of the State of Texas out of the sum set aside to the valid lien holders. This procedure would maintain the priority of the United States over the State of Texas, it would maintain the priority of the State of Texas over the lien holders, and it would maintain the priority of the lien holders over the claim of the State of Texas. It, therefore, appears that the decision reached by this Honorable Court in the Wynne case does not necessarily follow from the situation described by this Court wherein it states that the lien of the State of Texas is superior to the chattel mortgage liens and that said chattel mortgage liens are superior to the claim of the United States.

We are then relegated to the decisions of the Supreme Court of the United States to determine whether the claim of the United States of America is prior to the claim of the State of Texas in the instant case. Upon this issue this Honorable Court is again referred to the case of Spokane County vs. United States, 279 U. S. 80, for a thorough examination of the United States Supreme Court cases, and for the decision reached by Chief Justice Taft in that case in holding that Section 3466 of the Revised Statutes of the United States gave the United States of America priority over the taxes levied by Spokane County. Chief Justice Taft after reviewing the numerous decisions of the United States Supreme Court, concludes therefrom as follows:

347 "The foregoing citations certainly make it clear that the United States has power, in order to collect its taxes and its revenues and debts due it, to confer priority for them over those of the States."

It is undisputed in the instant case that Nix was insolvent on and subsequent to the date this suit was filed. Under the plain language of Section 3466 the claim of the United States is entitled to priority over all other claims except innocent purchasers and mortgagees whose interests attached before, and without any notice of, the claim of the United States. Spokane County vs. United States, 279 U. S. 80; United States vs. Oklahoma, 261 U. S. 253; Price, Receiver vs. United States, 269 U. S. 492.

ASSIGNMENT OF ERROR NO. 1

The Court of Civil Appeals erred in holding that the claim of the State of Texas is entitled to payment prior to the claim of the United States of America.

(The foregoing assignment is Ground No. 2 of the Petitioner's Motion for Rehearing in the Court of Civil Appeals.)

PROPOSITION UNDER ASSIGNMENT OF ERROR NO. 1

It being undisputed that the taxpayer W. L. Nix was insolvent on and subsequent to the filing of this suit and that he was indebted to the United States of America in the sum of $20,907.61 for taxes and penalties due on motor fuels manufactured and sold by Nix, the United States of America is entitled to have its said claim paid prior to the claim of the State of Texas for taxes due it by Nix on motor fuel manufactured and sold by him. (Raised by Ground No. 2 of Petitioner's Motion for Rehearing in the Court of Civil Appeals.)

STATEMENT UNDER ASSIGNMENT OF ERROR NO. 1 AND PROPOSITION THEREUNDER

Nothing can be added to the undisputed facts set forth in the preliminary statement hereof, which facts are established by the opinion rendered herein by this Honorable Court on December 6, 1939, and the opinion rendered herein by the Court of Civil Appeals on March 15, 1940.
348 The Court of Civil Appeals following the reasoning of this Honorable Court as set forth in the case of State of Texas vs. B. J. Wynne, 133 S. W. (2d) 951, in effect held that the claim of the United States of America should be subordinated to the claim of the State of Texas for the reason that a holding in favor of the United States over the State of Texas would have the effect of subordinating the claim of the State of Texas to those of valid lien holders. But, as heretofore pointed out, this reasoning is wholly fallacious, because the State of Texas can be amply protected by the Court directing that its claim be paid out of the fund first set aside to the valid lien holders. As pointed out in Spokane County vs. United States, 279 U. S. 80, the relative priorities of the parties, according to the plain wording of Section 3466, Revised Statutes of the United States, could be maintained.

ASSIGNMENT OF ERROR NO. 2

The Court of Civil Appeals erred in rendering judgment in favor of the State of Texas against the United States of America,

to the extent of the remaining amount of money in the Court's hands, after the payment of all unpaid costs.

(The foregoing assignment is Ground No. 1 of Petitioner's Motion for Rehearing in the Court of Civil Appeals.)

PROPOSITION UNDER ASSIGNMENT OF ERROR NO. 2

Section 3466 of United States Revised Statutes provides in substance that whenever any person indebted to the United States is insolvent, the debts due the United States Shall be first satisfied, and it being undisputed that W. L. Nix was insolvent on and subsequent to the filing of this suit and it being undisputed that he was indebted to the United States of America in the sum of $20,907.61 for taxes and penalties due it, the debt of the United States should be first paid before the claims of the State of Texas should be paid. (Raised by Ground No. 1 of Petitioner's Motion for Rehearing in the Court of Civil Appeals.)

349 STATEMENT UNDER ASSIGNMENT OF ERROR NO. 2 AND PROPOSITION THEREUNDER

Substantially the same question is raised by the above assignment of error as is raised by Assignment of Error No. 1, and this Honorable Court is respectfully referred to the statement, argument and authorities appearing under Assignment of Error No. 1 and being applicable to Assignment of Error No. 2.

CONCLUSION

Plaintiff in error respectfully prays that writ of error be granted and that upon final hearing the judgment of the Court of Civil Appeals be reversed and the judgment of the trial Court be affirmed.

A copy of this application has been deposited with the Clerk of the Court of Civil Appeals for opposing counsel, Honorable Gerald C. Mann, Attorney General of the State of Texas, Austin, Texas, and a copy has likewise been mailed to said counsel.

Respectfully submitted.

STEVE M. KING,
United States Attorney.
JOHN D. RIENSTRA,
Assistant U. S. Attorney.

350 In Supreme Court of Texas

UNITED STATES OF AMERICA (W. L. NIX, ET AL.)

vs.

STATE OF TEXAS, ET AL.

Application No. 24999, From Gregg County, Second District

Order refusing application for writ of error

October 2, 1940

This day came on to be heard the application of Plaintiff in Error for a writ of error to the Court of Civil Appeals for the Second District, and the same having been duly considered, it is ordered that the application be refused; that applicant, United States of America, pay all costs incurred on this application. (Chief Justice Moore not sitting.)

351 In Supreme Court of Texas

Motion for rehearing

Filed Oct. 15, 1940

To the Honorable Supreme Court of the State of Texas:

Comes now the United States of America, Petitioner for a Writ of Error in the above case, and moves this Honorable Court to set aside its Order made on October 2, 1940, refusing Petitioner's Application for Writ of Error, and to grant this Petitioner a rehearing herein, grant its Application for Writ of Error, and upon final hearing, reverse the judgment of the Court of Civil Appeals, and affirm the judgment of the Trial Court, and in support thereof says as follows:

I

This Honorable Court erred in refusing your Petitioner's Application for Writ of Error, and in not sustaining its Assignment of Error Number 1, which reads as follows: "The Court of Civil Appeals erred in holding that the claim of the State of Texas is entitled to payment prior to the claim of the United States of America."

II

This Honorable Court erred in refusing to grant Petitioner's application for Writ of Error, and in failing to sustain its Assign-

ment of Error Number 2, which reads as follows: "The Court of Civil Appeals erred in rendering judgment in favor of the
352 State of Texas against the United States of America, to the extent of the remaining amount of money in the Court's hands, after the payment of all unpaid costs."

Wherefore, the United States of America prays that this Honorable Court grant it a rehearing herein, that this Court's decision on October 2, 1940, refusing Petitioner's Application for Writ of Error, be set aside, that Petitioner's Application for Writ of Error be granted, and that upon a final hearing hereof, the judgment of the Court of Civil Appeals be reversed and the judgment of the Trial Court be affirmed.

Respectfully submitted,

STEVE M. KING,
United States Attorney.
JOHN D. RIENSTRA,
Assistant U. S. Attorney.

The Attorneys of Record in this case for the Defendant in Error, State of Texas, are as follows: Honorable Gerald C. Mann, Attorney General of the State of Texas, Capitol Building, Austin, Texas; and Honorable Pat M. Neff, Jr., Assistant Attorney General, Capitol Building, Austin, Texas.

[File endorsement omitted.]

353 In Supreme Court of Texas

UNITED STATES OF AMERICA

vs.

THE STATE OF TEXAS ET AL.

Motion No. 14724. From Gregg County, Second District

Order overruling motion for rehearing

October 30, 1940

The motion for rehearing filed herein, having heretofore been presented to the Court, and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

354 [Clerk's certificate to foregoing transcript omitted in printing.]

361 In Supreme Court of the United States

Order granting extension of time to file a petition for writ of certiorari

Upon motion of counsel for the United States, and good cause appearing, it is ordered that the time within which the United States may file a petition for a writ of certiorari in the above entitled case (variously designated below as State of Texas et al. v. W. L. Nix et al. and M. R. Ingram v. W. L. Nix et al.) be, and it is hereby, extended for a period of sixty days from January 30, 1941.

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

JANUARY 23, 1941.

362 In Supreme Court of the United States

Stipulation as to printing of the record

Filed March 27, 1941

It is hereby stipulated by and between counsel for the United States and counsel for the State of Texas that in order to reduce the size of the printed record, the Clerk of the Supreme Court may eliminate the following from the printed record:

1. Exchange of Benches. (R. 6.)
2. Receiver's Report for 1933. (R. 24–27.)
3. Original claims of United States. (R. 28–35.)
4. Duplicate of amended claim of United States. (R. 41–44.)
5. Annual Report of Receiver (1934). (R. 45–48.)
6. Order Approving Receiver's Report. (R. 49.)
7. Receiver's Application to Sell Property. (R. 50–51.)
8. Order Authorizing Sale of Property. (R. 52–53.)
9. Application of Receiver to Sell Oil. (R. 53–54.)
10. Order for Receiver to Sell Oil. (R. 55.)
11. Copy of Conveyance by Receiver. (R. 56–61.)

363 12. Final Report of Receiver. (R. 62–65.)
13. Order Extending Term of Court. (R. 100.)
14. Bill of Costs. (R. 112–113.)
15. Statement of Facts and Proceedings in the District Court (Testimony and Exhibits). (R. 114–271.)
16. Motion to Stay Mandate. (R. 331–333.)

17. Order Staying Mandate (April 12, 1940). (R. 334.)
18. Motion to Stay Mandate. (R. 355–357.)
19. Order Staying Mandate (Nov. 15, 1940). (R. 358.)

FRANCIS BIDDLE,
Solicitor General of the United States,
GERALD C. MANN,
Attorney General of Texas,
GEO. W. BAPTUS,
PAT M. NEFF, JR.,
Assistant Attorneys General of Texas,
Counsel for State of Texas.

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

Order allowing certiorari

Filed May 12, 1941

The petition herein for a writ of certiorari to the Court of Civil Appeals, 2d Judicial District, State of Texas, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MAR 31 1941

No. 906 44

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE STATE OF TEXAS ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND JUDICIAL DISTRICT OF TEXAS

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	3
Statutes involved	3
Statement	3
Specification of errors to be urged	6
Reason for granting the writ	6
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Conard v. *Atlantic Insurance Co.*, 1 Pet. 386	7
New York v. *Maclay*, 288 U. S. 290	7
Savings & Loan Society v. *Multnomah County*, 169 U. S. 421	7
Spokane County v. *United States*, 279 U. S. 80	7
State v. *Wynne*, 134 Tex. 455	5
Thelusson v. *Smith*, 2 Wheat. 396	7
United States v. *Hooe*, 3 Cranch 73	7
United States v. *Knott*, 298 U. S. 544	3
Statutes:	
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 617	9
Revised Statutes:	
Sec. 3186 (U. S. C., Title 26, Secs. 1560–1562)	10
Sec. 3466 (U. S. C., Title 31, Sec. 191)	9
Vernon's Civil Statutes of Texas:	
Art. 7065 a–2	11
Art. 7065 a–7	11

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 906

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE STATE OF TEXAS ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND JUDICIAL DISTRICT OF TEXAS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review a decision of the Court of Civil Appeals for the Second Judicial District of Texas reversing a judgment of the District Court of Gregg County, Texas.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas (R. 66) is reported in 138 S. W. (2d) 924. The opinion of the Supreme Court of Texas (R. 58) answering the certified questions is reported in 134 Tex. 476, 133 S. W. (2d) 963.

JURISDICTION

The judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas was entered on March 15, 1940 (R. 65). The application by the United States for a writ of error was denied by the Supreme Court of Texas on October 2, 1940 (R. 82), and a motion for rehearing (R. 82) was overruled by the Supreme Court of Texas on October 30, 1940 (R. 83). On January 23, 1941, Mr. Justice Black extended the time within which the United States might file a petition for a writ of certiorari for a period of 60 days from January 30, 1941 (R. 84).

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, on the ground that the decision below denied a title, right, privilege or immunity claimed by the United States under Section 3466 of the Revised Statutes of the United States.

The court below held that in a state receivership involving the competing claims of the United States, the State of Texas and a chattel mortgagee against the assets of an insolvent debtor, the relative priorities are: Texas, first; the mortgagee, second; and the United States, third. The United States contends that under Section 3466 of the Revised Statutes the claim of the Federal Government should have priority over the claim of the State. This federal question was litigated

in the District Court of Greeg County (R. 1, 34–41), and was considered by the Supreme Court of Texas in answer to questions certified by the Court of Civil Appeals (R. 58). After the Court of Civil Appeals had entered its judgment in accord with the answers to the certified questions, the United States again raised the issue by application to the Supreme Court of Texas for a writ of error (R. 73), and again by a motion for rehearing in the Supreme Court of Texas (R. 82) which were denied (R. 82, 83).

The question presented is one of substance. Cf. *New York* v. *Maclay*, 288 U. S. 290; *Spokane County* v. *United States*, 279 U. S. 80; *United States* v. *Knott*, 298 U. S. 544, 549.

QUESTION PRESENTED

Whether, under Section 3466 of the Revised Statutes, the claim of the United States against an insolvent person for gasoline taxes is entitled to priority in payment over the claim of the State of Texas for state gasoline taxes.

STATUTES INVOLVED

The applicable statutes are set out in the Appendix, *infra*, pp. 9–11.

STATEMENT

This case involves the competing claims of the United States, the State of Texas, and a chattel mortgagee against the assets of an insolvent debtor, W. L. Nix. The litigation was initiated on November 20, 1933, in the District Court of Gregg

County, Texas, by a creditor's petition filed by one M. R. Ingram, seeking the appointment of a receiver (R. 1). A receiver was appointed on the same day (R. 4).

Three interventions followed which furnish the basis for this controversy: one by R. P. Ash, a chattel mortgagee, seeking payment of the mortgage indebtedness (R. 5); a second by the State of Texas on account of state gasoline taxes (R. 9); and the third by the United States on account of Federal gasoline taxes (R. 12). Thereafter, one Howard Dailey appeared as successor in interest to the mortgage claim of Ash (R. 15).

The facts, as determined by the trial court (R. 34–40), may be summarized as follows:

On November 20, 1933, and at all times thereafter, Nix was insolvent (R. 40, 58). Upon the sale of Nix's assets and payment of the costs of administration, the receiver turned into the custody of the court the total amount of $7,516.92 (R. 36, 40).

The Ash mortgage note was executed September 19, 1933, and was in the face amount of $4,651.86. The mortgage was duly recorded September 20, 1933, and no payments have been made thereon (R. 39). Of the amount turned into the custody of the court by the receiver, $1,294.80 thereof was allocable to the property covered by the mortgage (R. 38, 40).

The gasoline taxes due to the United States relate to the period May–November 1933, and are in the amount of $19,343.91, including penalty (R. 36, 37, 40, 41).

The taxes, interest, fines, and penalties sought by the State of Texas, are in the total amount of approximately $42,812.51 (R. 37, 40).

The trial court ruled that after the payment of $75 as additional compensation to the receiver, (R. 38) the relative priorities were to be as follows: first, the claim of the mortgagee's successor in the amount of $1,294.80; second, the claim of the United States; and third, the claim of Texas (R. 40–41). However, since the prior claims would exhaust the debtor's assets, nothing would be left to be applied to the claim of Texas.

The State thereupon sought review in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the appellate court in turn sought instruction from the Supreme Court of Texas by means of certified questions (R. 41). The questions were answered by the Supreme Court of Texas in an opinion (R. 58) which relied largely upon an opinion in a companion case decided the same day (*State* v. *Wynne*, 134 Tex. 455, 133 S. W (2d) 951), the effect of which was to declare, first that the Texas statute (Section 7 of Article 7065a of Vernon's Ann. Civ. St.) giving Texas "a preferred lien, first and prior to any and all other existing liens" upon all the business property of a distributor of gasoline, is valid under both the

state and Federal constitutions; and second, that the claim of Texas is prior to that of the United States, notwithstanding the provisions of Revised Statutes, Section 3466.

In accordance with the answers to the certified questions, the Court of Civil Appeals thereupon ruled that the proper classification of the respective claims was Texas, first, lienholders, second, and United States, third (R. 71). It noted, however, that nothing would remain beyond the amount paid over to Texas (R. 71). The United States filed a motion for rehearing (R. 72), which was overruled (R. 72). The United States then applied to the Supreme Court of Texas for a writ of error (R. 73), which was refused (R. 82), and a motion for rehearing thereafter filed October 15, 1940 (R. 82) was likewise overruled (R. 83).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In granting priority in payment of the claim of the State of Texas over the claim of the United States.

2. In holding that the lien of the State of Texas, if any, was superior to the lien or prior rights of the United States.

3. In reversing the decision and judgment of the District Court of Gregg County, Texas, granting priority in payment of the claim of the United States over the claim of the State of Texas.

REASON FOR GRANTING THE WRIT

Under Revised Statutes, Section 3466, the United States is entitled to priority over the claims of States (see, e. g., *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290), and such priority prevails even though the State has attempted to give itself a general prior lien on all of the assets of the debtor (*New York* v. *Maclay*, *supra*).

However, as a result of interpretation of Section 3466, the claim of a mortgage creditor precedes the claim of the United States.[1] Accordingly, under Section 3466, the priorities here should be: the mortgage creditor, first, the United States, second, and the state of Texas, third.

Under Texas law, on the other hand, the claim of the State is prior to that of the mortgage creditor. The Texas court therefore ruled that the priorities here must be in the following order: Texas, first, the mortgagee, second, and the United States, third.

But it is plain that regardless of its local policy, the State of Texas cannot vary the priorities established by Section 3466 to the detriment of the United States.

The problem was recognized in *Spokane County* v. *United States*, 279 U. S. 80, and the Court set

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[1] See *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421, 428; cf. *United States* v. *Hooe*, 3 Cranch 73; *Thelusson* v. *Smith*, 2 Wheat. 396, 426; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386.

forth without comment the solution suggested by the Government, i. e., that the relative priorities may be preserved by setting apart sufficient funds to pay the mortgagee before paying the federal taxes and then providing for the payment of the state taxes out of the funds so set apart (279 U. S. at 91). Such procedure would recognize the preference given to the mortgagee by the United States, and would give effect *pro tanto* to the priority accorded to the State by its own legislature over the mortgagee.

The question presented involves a rather delicate adjustment of conflicting claims of State and Nation, and it is therefore in the public interest that the question be settled by this Court. Moreover, the question is one which is frequently recurring in the administration of the revenue laws, and it is a matter of general importance that the issue be authoritatively decided.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MARCH 1941.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 617. TAX ON GASOLINE.

(a) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

(b) If a producer or importer uses (otherwise than in the production of gasoline) gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this title be considered a sale.

(c) As used in this section—

(1) the term "producer" includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer.

(2) the term "gasoline" means gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes.

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a

voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. [U. S. C., Title 31, Sec. 191.]

SEC. 3186 [as amended by the Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 613]. (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or

(2) in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

(3) in the office of the clerk of the Supreme Court of the District of Columbia, if

the property subject to the lien is situated in the District of Columbia.

* * * * *

[U. S. C., Title 26, Secs. 1560–1562.]

Vernon's Civil Statutes of Texas:

ART. 7065 a–2. *Occupation or excise tax; rate; reports by distributors to Comptroller.*—(a) There is hereby imposed an occupation or excise tax of four (4) cents on each gallon of motor fuel or fractional part thereof. * * *

* * * * *

ART. 7065 a–7. *State's lien on property of distributor for taxes, fines, etc.*—All taxes, fines, penalties and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all of the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, stocks on hand of every kind and character whatsoever used or usable in such business, including crude oil or other materials for the manufacture, refining, blending or compounding of motor fuels and the refined products therefrom and the proceeds from the sale of such materials and refined products, and any other property of every kind and character whatsoever and wherever situated devoted to such use, and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business.

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No. 44

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND JUDICIAL DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	5
Summary of argument	6
Argument:	
The United States is entitled to priority except to the extent of the mortgagee's claim	7
Conclusion	14
Appendix	15

CITATIONS

Cases:	
Arnson v. *Murphy*, 109 U. S. 238	13
Brent v. *Bank of Washington*, 10 Pet. 596	8
Conard v. *Atlantic Insurance Co.*, 1 Pet. 386	8
Dollar Savings Bank v. *United States*, 19 Wall. 227	13
Ferris v. *Chic-Mint Gum Co.*, 14 Del. Ch. 232	12
Florida v. *Mellon*, 273 U. S. 12	13
McCulloch v. *Maryland*, 4 Wheat. 316	13
New York v. *Maclay*, 288 U. S. 290	6, 8, 9, 12, 13
Savings Society v. *Multnomah County*, 169 U. S. 421	8
Spokane County v. *United States*, 279 U. S. 80	9, 12, 13
State v. *Wynne*, 134 Tex. 455	4, 11
Thelusson v. *Smith*, 2 Wheat. 396	8
United States v. *Fisher*, 2 Cranch 358	12
United States v. *Knott*, 298 U. S. 544	10
United States v. *Snyder*, 149 U. S. 210	13
United States v. *Summerlin*, 310 U. S. 414	13
Statutes:	
Revenue Act of 1932, 47 Stat. 169:	
Sec. 617	15
Revised Statutes:	
Sec. 3186 (U. S. C., Title 26, Secs. 1560–1562)	16
Sec. 3466 (U. S. C., Title 31, Sec. 191)	15
Vernon's Texas Statutes (1936), Title 122:	
Chapter 2:	
Art. 7065a–2	17
Art. 7065a–7	17

Statutes—Continued.
Vernon's Texas Statutes—Continued.
Chapter 8: Page
Art. 7266 18
Art. 7272 18
Art. 7273 18
Art. 7274 19
Art. 7275 19
Miscellaneous:
Rogge, *Differences in the Priority of the United States in Bankruptcy and in Equity Receiverships* (1929), 43 Harv. L. Rev. 251, 275 12

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OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas (R. 66) is reported in 138 S. W. (2d) 924. The opinion of the Supreme Court of Texas (R. 58) answering the certified questions is reported in 134 Tex. 476, 133 S. W. (2d) 963.

JURISDICTION

The judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas was entered on March 15, 1940. (R. 65.) The appli-

cation by the United States for a writ of error was denied by the Supreme Court of Texas on October 2, 1940 (R. 82), and a motion for rehearing (R. 82) was overruled by the Supreme Court of Texas on October 30, 1940 (R. 83). On January 23, 1941, Mr. Justice Black extended the time within which the United States might file a petition for a writ of certiorari for a period of 60 days from January 30, 1941 (R. 84). Petition for a writ of certiorari was filed March 31, 1941, and was granted May 12, 1941.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Section 3466 of the Revised Statutes, the claim of the United States against an insolvent person for gasoline taxes is entitled to priority in payment over the claim of the State of Texas for state gasoline taxes.

STATUTES INVOLVED

The applicable statutes are set out in the Appendix, *infra*, pp. 15–19.

STATEMENT

This case involves the competing claims of the United States, the State of Texas, and a chattel mortgagee against the assets of an insolvent debtor, W. L. Nix. The litigation was initiated on No-

vember 20, 1933, in the District Court of Gregg County, Texas, by a creditor's petition filed by one M. R. Ingram seeking the appointment of a receiver (R. 1–4). A receiver was appointed on the same day (R. 4).

Three interventions followed which furnish the basis for this controversy: one by R. P. Ash, a chattel mortgagee, seeking payment of the mortgage indebtedness (R. 5); a second by the State of Texas on account of state gasoline taxes (R. 9); and the third by the United States on account of federal gasoline taxes (R. 12). Thereafter, one Howard Dailey appeared as successor in interest to the mortgage claim of Ash (R. 15).

The facts, as determined by the trial court (R. 34–40), may be summarized as follows:

On November 20, 1933, and at all times thereafter, Nix was insolvent (R. 40, 58). Upon the sale of Nix's assets and payment of the costs of administration, the receiver turned into the custody of the court the total amount of $7,516.92 (R. 36, 40).

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The taxes, interest, fines, and penalties sought by the State of Texas, are in the total amount of approximately $42,812.51 (R. 37, 40).

The trial court ruled that after the payment of $75 as additional compensation to the receiver (R. 38), the relative priorities were to be as follows: first, the claim of the mortgagee's successor in the amount of $1,294.80; second, the claim of the United States; and third, the claim of Texas (R. 38, 40–41). However, since the prior claims would exhaust the debtor's assets, nothing would be left to be applied to the claim of Texas.

The State thereupon sought review in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the appellate court in turn sought instruction from the Supreme Court of Texas by means of certified questions (R. 41). The questions were answered by the Supreme Court of Texas in an opinion (R. 58) which relied largely upon an opinion in a companion case decided the same day (*State* v. *Wynne*, 134 Tex. 455), the effect of which was to declare, first that the Texas statute (Section 7 of Article 7065a of Vernon's Texas Civ. St.) giving Texas "a preferred lien, first and prior to any and all other existing liens" upon all the business property of a distributor of gasoline, is

valid under both the State and Federal Constitutions; and second, that the claim of Texas is prior to that of the United States, notwithstanding the provisions of Revised Statutes, Section 3466.

In accordance with the answers to the certified questions, the Court of Civil Appeals thereupon ruled that the proper classification of the respective claims was Texas, first, lienholders, second, and United States, third. (R. 71.) It noted, however, that nothing would remain beyond the amount paid over to Texas. (R. 71.) The United States filed a motion for rehearing (R. 72), which was overruled (R. 72). The United States then applied to the Supreme Court of Texas for a writ of error (R. 73), which was refused (R. 82), and a motion for rehearing thereafter filed October 15, 1940 (R. 82), was likewise overruled (R. 83).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In granting priority in payment of the claim of the State of Texas over the claim of the United States.

2. In holding that the lien of the State of Texas, if any, was superior to the lien or prior rights of the United States.

3. In reversing the decision and judgment of the District Court of Gregg County, Texas, granting priority in payment of the claim of the United States over the claim of the State of Texas.

SUMMARY OF ARGUMENT

Under Section 3466 of the Revised Statutes the debts owing to the United States are entitled to priority over the debts owing to the state, notwithstanding the provisions of any state legislation purporting to give the state a general lien upon the insolvent debtor's property. *New York* v. *Maclay*, 288 U. S. 290. Accordingly, if this proceeding were simply a contest between the United States and Texas, the *Maclay* decision would plainly require that the Texas claim be subordinated to that of the United States.

The complication presented by the presence of a third creditor, a chattel mortgagee is due to the fact that under Section 3466, the United States recognizes his priority over that of the Federal Government, while under Texas law, his claim is inferior to that of the State. Thus the lower courts thought that they were faced with the dilemma of (1) either placing the mortgagee ahead of the United States and thereby defeating the local priority of the state (i. e., mortgagee, first, United States, second, and Texas, third), or (2) placing the State ahead of the mortgagee, with the result that the United States would be third, and thus lose the advantage intended by Section 3466. The Texas courts chose the second alternative.

We submit that the dilemma was not a true one. The correct solution is to set aside sufficient funds to meet the mortgagee's prior claim under Sec-

tion 3466, placing the United States second, but permitting the State to assert its local priority over the mortgagee with respect to the amount set aside. This solution gives effect to the rights of the United States under Section 3466, and at the same time subordinates the claim of the mortgagee to that of the State under local law. Any other solution based upon state law that would place the United States in a less advantageous position would of necessity render the state statute unconstitutional.

ARGUMENT

THE UNITED STATES IS ENTITLED TO PRIORITY EXCEPT TO THE EXTENT OF THE MORTGAGEE'S CLAIM

1. It may be helpful at the outset to indicate the precise nature of the federal statutory provisions involved. In seeking to enforce a tax liability as against the competing claims of other creditors, the United States generally relies upon either Section 3186 or Section 3466 of the Revised Statutes. See Appendix, *infra*, pp. 15–17. These sections, although superficially dealing with the same general problem, have independent spheres of operation. Section 3186 is a *lien* statute, whereas Section 3466 is merely a *priority* statute.

Under specified conditions, Section 3186 accords the United States a lien upon a taxpayer's property, and whether that lien is superior to the specific liens held by other creditors generally depends

upon which lien is prior in time. Section 3466, on the other hand, does not create any lien; it simply provides that in the case of an insolvent debtor the debts due to the United States (whether for taxes or otherwise) shall be paid first. In the absence of any outstanding mortgages, the United States prevails over all other creditors, and its rights are subordinate only to prior rights of mortgagees.[1]

This case arises under Section 3466, rather than under Section 3186. Accordingly, the rights of the United States depend, not upon any lien, but simply upon whatever priority is afforded by Section 3466. (The decisions below as well as a number of other decisions of lower courts often erroneously refer to Section 3466 as giving a "lien" to the United States.)

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[1] Although Section 3466 seems to require that all claims be subordinated to the federal claim, it has been judicially interpreted to allow priority to a mortgage creditor. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611–612; *Savings Society* v. *Multnomah County*, 169 U. S. 421, 428. The theory of these decisions is that a mortgage is really a conveyance by the mortgagor which divests the mortgagor of title thereby leaving nothing but an equity to which the preference can attach. See *Thelusson* v. *Smith*, 2 Wheat. 396, 426. This exception to the general rule was unenthusiastically restated by Mr. Justice Cardozo in the *Maclay* case (288 U. S. at 293–294), and he indicated serious doubt whether that exception would apply where the mortgage was of the lien type which did not effect a conveyance of legal title. For the purpose of this case, however, we assume that the exception is sound and that the mortgage herein falls within the exception.

2. Accordingly, if there were no mortgage creditor in this case, and if the controversy were merely as between the United States and Texas, it is clear that Section 3466 would require priority to be accorded to the claims of the United States.[2] *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290. And the mere fact that the state has attempted to give itself a general prior lien on the assets of the debtor would not change the result. *New York* v. *Maclay*, *supra*. Until the state's inchoate lien is perfected against specific property of the debtor, the state occupies the position of a general creditor for the purpose of Section 3466, and its claim is subordinate to that of the United States. The *Maclay* case so holds and we do not understand Texas to contend otherwise.

That the lien of the state is only an inchoate one is confirmed by the state's comprehensive system for the collection of delinquent taxes. Articles 7266, 7272 and 7275 of Chapter 8, Title 122, Vernon's Texas Statutes provide in detail for the seizure and sale of property to satisfy tax claims, and make it plain that it is necessary for the state to levy upon the property to defeat the priority of the United States. As this Court said in the *Maclay* case (288 U. S. at 293–294):

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[2] The decision of a Missouri Court of Appeals, that section 3466 has been modified by the Bankruptcy Act, is now before the Court and need not be discussed here. See *United States* v. *Emory*, No. 33, this Term.

> In what has been written there has been an assumption in favor of the petitioner that the tax would have priority if its amount had been liquidated before rights and interests became static through insolvency proceedings. The assumption is hardly to be reconciled with a judgment of this court pronounced a century and more ago. *Thelusson* v. *Smith*, 2 Wheat. 396, 426. The ruling there was that the general lien of a judgment upon the lands of an insolvent debtor is subordinate to the preference established by the statute unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession. * * *

Thus, the so-called lien of the State of Texas is inchoate and "lacks the characteristics of a specific perfected lien which alone bars the priority of the United States." *United States* v. *Knott*, 298 U. S. 544, 551. And if further confirmation is needed that the Texas statute did not effect a transfer of title from the insolvent taxpayer it may be found in the fact that the receiver was permitted to take over all of the taxpayer's property and sell it under court order. If the state had perfected its lien by a prior levy the property would not have been a part of the insolvent's estate.

Therefore, if this case were simply a contest between the United States and Texas, the priority of the Federal Government's claim would not be open to question. But this case is complicated by

the fact that in addition to the claims of the United States and Texas, there is a claim of a chattel mortgagee. The United States recognized the prior claim of the mortgagee, and accordingly urged that, under Section 3466, the relative priorities should be: the mortgage creditor, first, the United States, second, and the State of Texas, third. The State, on the other hand, relying upon its own statutes insisted upon preceding the mortgagee. Thus, the courts below considered themselves faced with the dilemma of either placing Texas third under the scheme of Section 3466 and thereby depriving the state of its local priority over the mortgagee, or by placing Texas first, and thereby varying the priorities under Section 3466 to the disadvantage of the United States.[3]

We submit (a) that the dilemma is more apparent than real, for the relative priorities required by Section 3466 can be given effect, while at the same time recognizing the state's superiority over the mortgage creditor under local law; and (b) that, in any event, even if the scheme of priorities under Section 3466 were inconsistent with state law the latter would have to yield.

(a) The priorities required by Section 3466 can be given effect while at the same time subordinating

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[3] The opinion of the Supreme Court of Texas (R. 58–64) simply set forth the statement of facts and certified questions, and disposed of the case without discussion by referring to its recent opinion in *State* v. *Wynne*, 134 Tex. 455, where it had given extensive consideration to the issues involved.

the claim of the mortgagee to that of the state. The problem was recognized in *Spokane County* v. *United States, supra,* and the Court set forth without comment the solution suggested by the Government, namely, that the correct result could be achieved by "setting apart sufficient funds to pay the mortgage before paying the federal taxes and then providing for payment of the state tax out of the sum so set apart." 279 U. S. at 91.

We submit that such an allocation of the debtor's assets not only carries out the purpose of Congress, but also gives effect to the priority accorded to the state by its own legislature over the mortgagee. Thus the suggested solution fully recognizes the scheme of priorities established by the Texas legislature within the limits of Section 3466 and the *Maclay* and *Spokane County* decisions.[4]

(b) If the suggested solution cannot be adopted, and if the Texas statute varies the priorities so that the United States is placed in a less advantageous position than is accorded to it by Section 3466, we then submit that the state statute would have to give way. The supremacy of the federal priority over that of the states was recognized by the Court as early as 1805 in *United States* v. *Fisher,* 2 Cranch 358. There, in response to the attack upon the statutory provisions which later became Sec-

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[4] A seemingly contrary result in *Ferris* v. *Chic-Mint Gum Co.*, 14 Del. Ch. 232, has been adversely criticized in Rogge, *The Differences in the Priority of the United States in Bankruptcy and in Equity Receiverships* (1929), 43 Harv. L. Rev. 251, 275.

tion 3466, Chief Justice Marshall declared (pp. 395–396):

> This claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties, respecting the dignity of debts, and will defeat the measures they have a right to adopt, to secure themselves against delinquencies on the part of their own revenue officers. But this is an objection to the constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends.

Cf. *Florida* v. *Mellon,* 273 U. S. 12, 18.

Similarly, in providing for collection of taxes through the enforcement of liens, Congress may legislate in complete disregard of state laws relating to the recording of mortgages or liens. *United States* v. *Snyder,* 149 U. S. 210. And it has become firmly established that it is beyond the power of a state legislature to enact laws that may retard or impede the operation of the revenue laws of the national government. *New York* v. *Maclay, supra; Spokane County* v. *United States, supra.* Cf. *McCulloch* v. *Maryland,* 4 Wheat. 316; *United States* v. *Summerlin,* 310 U. S. 414; *Dollar Savings Bank* v. *United States,* 19 Wall. 227; *Arnson* v. *Murphy,* 109 U. S. 238.

It is therefore quite apparent that if the Texas statute be applied so as to place the United States

in a position inferior to that otherwise required by Section 3466, the Texas statute would be invalid.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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Acting Solicitor General.
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CLARENCE E. DAWSON,
Special Assistants to the Attorney General.

AUGUST, 1941.

APPENDIX

Revenue Act of 1932, 47 Stat. 169:

SEC. 617. TAX ON GASOLINE.

(a) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

(b) If a producer or importer uses (otherwise than in the production of gasoline) gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this title be considered a sale.

(c) As used in this section—

(1) the term "producer" includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer.

(2) the term "gasoline" means gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motorboats, or aeroplanes.

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well

to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (U. S. C., Title 31, Sec. 191.)

SEC. 3186 (as amended by the Revenue Act of 1928, 45 Stat. 791, Sec. 613). (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or

(2) in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

(3) in the office of the clerk of the Supreme Court of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(U. S. C., Title 26, Secs. 1560–1562.)

Vernon's Texas Statutes (1936):

TITLE 122—TAXATION

CHAPTER 2.—TAXES BASED UPON GROSS RECEIPTS

* * * * *

ART. 7065a–2 *Occupation or excise tax; rate; reports by distributors to Comptroller.*—(a) There is hereby imposed an occupation or excise tax of four (4) cents on each gallon of motor fuel or fractional part thereof. * * *

* * * * *

ART. 7065a–7. *State's lien on property of distributor for taxes, fines, etc.*—All taxes, fines, penalties and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, stocks on hand of every kind and character whatsoever used or usable in such business, including crude oil or other materials for the manufacture, refining, blending or compounding of motor fuels and the refined products therefrom and the proceeds

from the sale of such materials and refined products, and any other property of every kind and character whatsoever and wherever situated devoted to such use, and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business.

* * * * *

CHAPTER 8.—COLLECTION AND COLLECTOR

* * * * *

ART. 7266. *Forced collections to begin.*—If any person shall fail or refuse to pay the taxes imposed upon him or his property by law, until the first day of January next succeeding the return of the assessment roll of the county to the Comptroller, the tax collector shall, by virtue of his tax roll, seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with all costs accruing thereon; * * *.

* * * * *

ART. 7272. *All property liable for taxes.*—All real and personal property held or owned by any person in this State shall be liable for all State and County Taxes due by the owner thereof, including tax on real estate, personal property and poll tax; and the Tax Collector shall levy on any personal or real property to be found in his county to satisfy all delinquent taxes, any law to the contrary notwithstanding; * * *.

ART. 7273. *Sales of personal property.*—In making sales of personal property for taxes, the collector shall give notice of the time and place of sale, together with a brief description of the property levied on and

to be sold, for at least ten days previous to the day of sale, by advertisements in writing to be posted at the courthouse door, and at two other public places in the county; and such sale shall take place at the courthouse door of the county in which the assessment is made, by public auction.

ART. 7274. *If property is insufficient.*—If personal property levied upon prove insufficient to satisfy the taxes and penalties due and costs accrued thereon, the collector shall levy upon and sell so much other personal taxable property belonging to the person as will be sufficient to satisfy such taxes, penalties and costs in the same manner as an original levy and sale, and, in all cases of sales for taxes, if there be an excess remaining in the hands of the collector, after satisfying all taxes, penalties and costs, the same shall be paid over to the original owner by the collector, or deposited in the hands of the county treasurer subject to the order of such owner.

ART. 7275. *Sales of real property.*—If the delinquent is not possessed of a sufficiency of personal property in the county subject to seizure and sale to satisfy all taxes due by him, the tax collector shall seize so much of the real estate of such delinquent, situated in the county, as will be sufficient to satisfy such taxes and all costs, and sell the same in accordance with the provisions of the succeeding article.

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NO. 44

IN THE

Supreme Court of the United States

October Term, 1941

THE UNITED STATES OF AMERICA,
Petitioner

v.

THE STATE OF TEXAS, ET AL

On Writ of Error to The Court of Civil Appeals for The Second Judicial District of Texas

BRIEF FOR THE STATE OF TEXAS

FIRM FOUNDATION—AUSTIN

SUBJECT INDEX

Page

Prelminary Statement 1

First Counter-Proposition 4

Second Counter-Proposition 4

Statement, Argument and Authorities under First Counter-Proposition 5

Statement, Authorities and Argument under Second Counter-Proposition 18

INDEX OF AUTHORITIES

CASES:

Beaston v. Farmers Bank of Delaware, 12 Pet. 102, 9 L. Ed. 1017 ..... 8, 9, 11, 13, 16, 17, 22

Blackrock Copper Mining & Milling Co. v. Tingey, 34 Utah 369, 98 Pac. 180, 28 L. R. A. (N.S.) 255 21

Bramwell v. United States F. & G. Co., 269 U. S. 483, 46 S. Ct. 176, 70 L. Ed. 368 ..... 8, 9, 12, 13

Brent v. The Bank of Washington, 9 U. S. 594, 9 L. Ed. 547 22

Central Fibre Products Co. v. Hardin, 82 Fed. (2d) 692, Certiorari denied, 299 U. S. 547, 57 S. Ct. 10, 81 L. Ed. 402 ..... 9, 17

Claude D. Reese, Inc. v. United States ex rel. Collector of Internal Revenue, 75 Fed. (2d) 9 10

INDEX OF AUTHORITIES—Continued

Page

Conard v. Atlantic Ins. Co., 1 Pet. 386, 7 L. Ed. 189 ..... 8, 12, 13, 22

Elfast v. Lamb, et al, 111 Fed. (2d) 434 ..... 9, 17

Ernst v. Guarantee Millwork, Inc., et al, 93 P. (2d) 404 ..... 19, 23

Ex Parte Klugsberg, 126 Tex. 225, 87 S. W. (2d) 465 ..... 20, 21, 33

George v. Dean, 47 Tex. 73 21

Gerson, Beesley & Hampton v. Shubert Theatres Corp., 7 Fed. Supp. 399 ..... 23, 41

Hodge v. Muscatine County, 196 U. S. 276, 49 L. Ed. 477 ..... 19, 21

In Re Brannon, 62 Fed. (2d) 959 ..... 19, 20, 32

In Re 2168 Broadway Corp., 78 Fed. (2d) 678, affirmed sub nomine Duparquet v. Evans, 297 U. S. 216, 56 S. Ct. 412, 80 L. Ed. 591 ..... 9, 17

In Re Cardwell, 52 Fed. (2d) 158 ..... 20, 32

In Re Fountain, Inc., 295 Fed. 873 10

In Re Lincoln Chair & Novelty Company, 9 N. E. (2d) 7 42

In Re Robertson, 20 Fed. Supp. 270 19

In Re A. J. Waterman Manufacturing Co., 291 Fed. 589 10

In Re White Star Refining Co., 74 Fed. (2d) 269 ..... 19, 22, 30, 43

INDEX OF AUTHORITIES—Continued

Page

In Re Wyley Co., 292 Fed. 900 10

Johnson & Burham, Inc., et al v. State, et al, 95 S. W. (2d) 144, (Tex. Civ. App.) 20, 21, 32

Kirk v. City of Gorman, 283 S. W. 188 (Tex. Civ. App.) 19

Libby, McNeill & Libby v. Sutton, 359 Ill. 398, 194 N. E. 572 22

People of the State of New York v. Mark M. Maclay, 288 U. S. 290, 77 L. Ed. 754, 53 S. Ct. 323 ..... 8, 13, 23, 26, 40

People of New York v. United States, 106 Fed. (2d) 210 ..... 9, 13, 23

Price v. United States, 269 U. S. 492, 46 S. Ct. 180, 70 L. Ed. 373 ..... 8, 13

Regan v. Metropolitan Haulage Co., 127 N. J. Eq. 487. 14 A. (2d) 257 ..... 20, 23

Republic Insurance Company v. Highland Park Independent School District of Dallas County, 57 S. W. (2d) 627 21

Spokane County v. United States, 279 U. S. 80, 73 L. Ed. 621, 49 S. Ct. 321 ..... 23, 24, 39, 44

Standard Accident Ins. Co. v. E. T. Sheftall & Co., 53 Fed. (2d) 40 ..... 9, 16

State v. Bradley, 207 Ala. 677, 93 So. 595, 26 A.L.R. 421 22

Page

State of Texas v. Donoghue, 88 Fed. (2d) 48, rev. on other grounds, 302 U. S. 284, 82 L. Ed. 264 ..... 19, 31

State v. Farmer, 94 Tex. 232, 59 S. W. 541 21

State v. Hunt, 207 S. W. 636 (Judgment reversed on other grounds, Hunt v. State, 110 Tex. 204, 217 S. W. 1034) 18

State v. Jones, et al, 290 S. W. 244, reversed on other grounds (Com. App.), 5 S. W. (2d) 973 ..... 19, 21

State ex rel. Mitchell v. National Life Insurance Co. of the United States, 275 N. W. 26 22

State of Mo. v. John T. Ross, Trustee, 299 U. S. 72, 57 S. Ct. 60 10

State v. Pioneer Oil & Refining Co., 292 S. E. 869, (Com. App.) 22, 43

State ex rel. Schwartz v. Ferris, 153 Ohio St. 1, 30 L. R. A. 21

State v. Wynne, 134 Tex. 455, 133 S. W. (2d) 951 20

Texas Banking & Insurance Co. v. State, 42 Tex. 636 22

Thelusson v. Smith, 2 Wheat, 396, 4 L. Ed. 271 ..... 22, 42

United States v. Butterworth-Judson Corp., 269 U. S. 504, 46 S. Ct. 179, 70 L. Ed. 380 ..... 8, 13

INDEX OF AUTHORITIES—Continued

Page

United States v. Knott, 298 U. S. 544, 56 S. Ct. 902, 80 L. Ed. 1321 ..... 22, 27

United States v. Nicholls, 4 Yeates 251 23

United States v. Oklahoma, 261 U. S. 253, 43 S. Ct. 295, 67 L. Ed. 638 ..... 8, 12, 13

Wright et al v. State, 71 S. W. (2d) 352, (Tex. Civ. App.) 20, 21, 32

Zorn v. Deberry, 4 Fed. Supp. 905 ..... 19, 31

CONSTITUTION OF TEXAS

Article VIII, Section 17 19

NATIONAL BANKRUPTCY ACT:

Section 64 10

Section 64a, Subdivision 4 10

REVISED STATUTES

Section 3186 (26 U.S.C.A. 1560-1562) 2, 3, 43, 44

Section 3466 (31 U.S.C.A. 191) 2, 3, 4, 5, 7, 8, 9, 11, 16, 17, 18, 22, 23, 24, 28, 43, 44

UNITED STATES CODE ANNOTATED:

Section 1, Subdivision 15, Title 11 14

Section 21 (5), Title 11 14

Section 107 (d) and (f), Title 11 31

INDEX OF AUTHORITIES—Continued

Page

VERNON'S TEXAS CIVIL STATUTES:

Article 2293, Subdivision 2, Chapter 13, Title 42 ..... 5, 6

Article 5238 32

Article 7065a-2(d), 3, 4, 5, 6, 7, 8, Chapter 2, Title 122 ..... 3, 5, 17, 19, 20, 21, 28, 33, 34, 35, 36, 37, 39

Article 7266, Chapter 8, Title 122 ..... 20, 30, 32, 33, 37, 38

Article 7272, Chapter 8, Title 122 ..... 20, 30, 32, 33, 37, 39

Article 7275, Chapter 8, Title 122 ..... 20, 30, 32, 33, 37, 39

OTHER AUTHORITIES:

61 C. J. 922 (Taxation, Sec. 1172) 22, 43

20 R. C. L. 392 (Taxation, Sec. 350) 21

28 Tex. Jur. 6 (Liens, Sec. 2) 19

40 Tex. Jur. 129 (Taxation, Sec. 91) 21

40 Tex. Jur. 202 (Taxation, Sec. 145) 18

40 Tex. Jur. 205 (Taxation, Sec. 146) 19

NO. 44

IN THE

Supreme Court of the United States

October Term, 1941

THE UNITED STATES OF AMERICA,
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v.

THE STATE OF TEXAS, ET AL

On Writ of Error to The Court of Civil Appeals for The Second Judicial District of Texas

BRIEF FOR THE STATE OF TEXAS

PRELIMINARY STATEMENT

Petitioner's statement of the case is adopted, except as supplemented by the statement appearing in connection with either of the two following Counter-Propositions of the State.

At this juncture, however, and to properly determine the limits and scope of this brief, we wish to point to the following ambiguity in the record:

On page 5 of Petitioner's brief under the heading "Specification of Errors to be Urged," we quote the following:

> "The court below erred:
>
> "1. In granting priority in payment of the claim of the State of Texas over the claim of the United States.
>
> "2. *In holding that the lien of the State of Texas, if any, was superior to the lien or prior rights of the United States.* (Italics ours)
>
> "3. *In reversing the decision and judgment of the District Court of Gregg County, Texas, granting priority in payment of the claim of the United States over the claim of the State of Texas.*" (Italics ours)

From the foregoing it would appear that the Federal Government, would, on this appeal, urge the preferential status of its claim under *both* Sections 3466, R. S. (31 USCA 191), the priority statute, and Section 3186 R. S. (26 USCA 1560-62), the lien statute, as was done in the trial court.

On the other hand, on page 2 of Petitioner's brief, we quote the "Question Presented" as follows:

> "Whether, under Section 3466 of the Revised Statutes, the claim of the United States against an insolvent person for gasoline taxes is entitled to priority in payment over the claim of the State of Texas for state gasoline taxes."

And on page 8 of said brief we find the following:

> "This case arises under Section 3466, rather than under Section 3186. Accordingly, the rights of the United States depend, not upon any lien, but simply upon whatever priority is afforded by Section 3466."

We have concluded from the latter two definite statements that the Government does not intend to rely, for purposes of this appeal, on Section 3186, R. S. (26 USCA 1560-62), to afford it a prior lien to secure the taxes involved, but merely and solely relies upon Section 3466 R. S. (31 USCA 191) to give it a priority, independent of any lien. Therefore, despite the contrary intent which seems to appear from the "Specification of Errors to be Urged," the State will limit its answering brief herein to the single question of whether or not Section 3466 R. S. operates to give the United States a right of prior payment from the proceeds of the receivership estate over the asserted prior lien of the State therein and thereto. We will accordingly not brief the question of priority between the lien asserted by the State under Section 7, Article 7065a, Vernon's Texas Civil Statutes, and the lien given to the United States to secure its internal revenue taxes under Section 3186, R. S.

FIRST COUNTER-PROPOSITION TO THE PROPOSITION OR QUESTION PRESENTED BY PETITIONER

The bill or petition upon which a receivership was sought and obtained in the instant case and subsequent interventions, merely making a case of a suit for debt on a promissory note, for foreclosure of a chattel mortgage lien upon specific property, and for a limited receivership in aid and assistance thereof, and ancillary thereto, and not a general equity, insolvency or liquidating receivership over all of the debtor's property, does not constitute either (1) "a voluntary assignment" by the debtor, or (2) a case "in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law," or (3) a "case in which an act of bankruptcy is committed," so as to bring the instant case within the three classes or conditions of insolvency, set out in and required by Section 3466, R. S. (Title 31 USCA Section 191), and consequently such priority Act may not be invoked by the United States of America to give it a priority over the State.

SECOND COUNTER-PROPOSITION TO THE QUESTION OR PROPOSITION PRESENTED BY PETITIONER

(Submitted Alternatively to First Counter-Proposition)

The motor fuel taxes claimed by the State of Tex-

as, were, before the accrual of the right to priority of payment, if any, claimed by petitioner under Section 3466, R. S. (Title 31 USCA Section 191), secured by a true, perfected and specific lien under Section 7, Article 7065a, Vernon's Texas Civil Statutes, upon the property involved in this receivership estate, rather than an inchoate, imperfect and general lien, and consequently such fixed lien cannot be impaired, affected or subordinated by petitioner's asserted right of priority under Section 3466, R. S. (31 USCA 191).

STATEMENT, AUTHORITIES AND ARGUMENT UNDER FIRST COUNTER-PROPOSITION

Statement from the Record

Plaintiff in the trial court sued upon a chattel mortgage note in the sum of $1,103.49, and sought foreclosure of a chattel mortgage lien securing same upon a small portion only of the receivership estate, to-wit:

> Six 250-barrel rundown tanks
> One 1000-barrel storage tank (R. pp. 1-3)

The usual allegations showing statutory grounds under Article 2293, Subdivision 2, Vernon's Texas Civil Statutes, for the appointment of a receiver upon lien foreclosure were made, such as that the mortgaged property was in danger of being materially in-

jured and that the conditions of the mortgage had not been performed and the value of the property was insufficient to discharge the mortgage debt; and that an emergency existed for the appointment of a receiver to preserve such properties (R. pp. 1-3). The receivership appears to be a limited statutory receivership under Art. 2293, Subd. 2, Vernon's Texas Civil Statutes, in contradistinction to a general equity receivership. The pertinent portions of such Article read as follows:

> "Receivers may be appointed by any judge of a court of competent jurisdiction of this state, in the following cases:
>
> ". . .
>
> "2. In an action by a mortgage for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or that the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt."

The prayer of plaintiff was for judgment for foreclosure of chattel mortgage lien and for order of sale and writ of possession, (R. pp. 3-4)

Defendant did not file any answer joining in the allegations of plaintiff and praying for the appointment of a receiver. (R.-Index)

R. P. Ash intervened on two chattel mortgage

notes and for foreclosure of the chattel mortgages securing same upon the refining properties in receivership, except the property subject to plaintiff's chattel mortgage (R. pp. 5-9)

Howard Dailey subsequently intervened as sole plaintiff, under allegations that he had acquired all the rights in the subject matter theretofore held by the original plaintiff, M. R. Ingram, and the intervenor, R. P. Ash, with prayer that his claim and liens be decreed as prior and superior to all other parties, against the proceeds in the registry of court, from the sale of such refining properties. (R. 15-21)

The State of Texas and the United States of America filed their respective tax claims and liens, by intervention. (R. 9 and 12).

The point of law presented by this Counter-Proposition involves only the petition or bill upon which the receivership was granted and subsequent interventions; because we take the position that even though an actual insolvency did exist, nevertheless, the Government would not be entitled to the preferential payment claimed from the assets of the estate because the petition or bill and the nature of the case generally, was insufficient, as a matter of law, to give rise to the right of priority claimed by the Government under Section 3466, Revised Statutes (Sec. 191, Title 31, USCA).

Therefore, we respectfully refer the Court to the

entire petition or bill and subsequent interventions in connection with this Counter-Proposition.

Authorities

A. In order for priority Act (Section 3466, R. S., 31 U.S.C.A. 191) to be available to petitioner, mere insolvency not enough but such insolvency must be manifested either by voluntary assignment by debtor, the attachment of the estate of an absconding, concealed or absent debtor, or an act of bankruptcy by such debtor.

United States v. Oklahoma, 261 U. S. 253, 262, 43 S. Ct. 295, 67 L. Ed. 638, 643, 644;
Beaston v. Farmers Bank, 12 Pet. 102, 9 L. Ed. 1017, 1029;
Conard v. Atlantic Ins. Co., 1 Pet. 386, 439, 7 L. Ed. 189, 212;
Bramwell v. United States F. & G. Co., 269 U. S. 483, 46 S. Ct. 176, 70 L. Ed. 368.

1. Appointment of receiver not "voluntary assignment" unless defendant debtor admits the allegations of plaintiff and joins in prayer for receivership, i. e. consent decree is had.

Price v. United States, 269 U. S. 492, 502, 46 S. Ct. 180, 70 L. Ed. 373, 378;
New York v. Maclay, 288 U. S. 290, 53 S. Ct. 323, 77 L. Ed. 754;
United States v. Butterworth-Judson Corp., 269 U. S. 504, 46 S. Ct. 179, 70 L. Ed. 380;

Bramwell v. United States F. & G. Co., 269 U. S. 483, 492, 46 S. Ct. 176, 70 L. Ed. 368;
People of New York v. United States, 106 F. (2d) 210.

2. To constitute "act of bankruptcy" receivership must be general equity receivership rather than limited or special receivership in suit for debt and lien foreclosure.

Beaston v. Farmers Bank of Delaware, 12 Pet. 102, 136, 9 L. Ed. 1017, 1030;
In Re 2168 Broadway Corporation, 78 Fed. (2d) 678, affirmed sub nomine Duparquet v. Evans, 297 U. S. 216, 56 S. Ct. 412, 80 L. Ed. 591;
Central Fibre Product Co. v. Hardin, 82 F. (2d) 692, certiorari denied, 299 U. S. 547, 57 S. Ct. 10, 81 L. Ed. 402;
Standard Accident Ins. Co. v. E. T. Sheftall & Co., 53 Fed. (2d) 40, 41;
Elfast v. Lamb, et al, 111 Fed. (2d) 434.

Argument

We do not believe that it will be controverted by counsel for the Government that the right of priority asserted by them in this receivership is not in virtue of any sovereign prerogative inherent in the United States as against the rights of the State in the collection of debts but rather the asserted right of priority rests exclusively on the statutory provision involved, being *Section* 191, *Title* 31, *USCA* (*R.S.* 3466). This

is too well settled to require the citation of authorities.

In this connection, we might point out that in addition to the absence of a sovereign prerogative, it has not been and is not now the policy of Congress to enact measures which uniformly and consistently accord the United States a priority of payment over taxes owing to states and political subdivisions. As an illustration, we point out that the statute under consideration in this case, fixing priority of claims due the Government, has been superseded, in bankruptcy cases, by Section 64 of the National Bankruptcy Act; *Claude D. Reese Inc.* v. *United States ex rel Collector of Internal Revenue*, 75 Fed. (2d) 9. And by Subdivision 4 of Section 64a of the National Bankruptcy Act, the various governmental units have been placed in a single class upon terms of equality with one another, and the United States is given no priority over states, counties, districts and municipalities in respect of tax claim. *In Re A. E. Fountain Inc.*, 295 Fed. 873, *In Re Wyley Co.*, 292 Fed. 900, *In Re A. J. Waterman Manufacturing Co.*, 291 Fed. 589, *State of Mo.* v. *John T. Ross, Trustee*, 299 U. S. 72, 57 S. Ct. 60.

While the case at bar involves a receivership rather than bankruptcy, we make this point only to show that the Government's claim to priority must find support squarely within the express terms of the statute relied upon, and if that Act fails to avail, there can be no resort to sovereignty or even Congressional policy to support such priority.

For the convenience of the Court, the Act of Congress under consideration is reproduced as follows:

> "*Priority established.* Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrator, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; *and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.* (R. S. Section 3466)" (Italics ours).

Adverting now to the nature and attributes of the Act under consideration, we think the following established rules may be fairly deduced from the adjudicated cases:

First, no lien is created; second, the priority established can never attach while the debtor continues the owner and in possession of the property, though he may be unable to pay all his debts; third, no evidence can be received of the insolvency of the debtor until he has been divested of his property in one of the modes stated; and fourth, whenever the debtor is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay the debt first out of the proceeds of the debtor's property. *Beaston* v.

Farmers Bank, United States v. *Oklahoma, Conard* v. *Atlantic Ins. Co., Bramwell* v. *United States F. & G. Co.*, all supra, "Authorities", A.

The nature of the insolvency contemplated by the Act under consideration has been before the United States Supreme Court and inferior Federal courts for construction. The meaning of the word "insolvent" used in the Act and of the insolvency therein referred to, is limited by the language to cases where "a debtor not having sufficient property to pay all his debts makes a voluntary assignment, etc." Common law insolvency or mere inability of a debtor to pay all his debts as they mature in the ordinary course of business is not insolvency within the meaning of the Act. The insolvency contemplated is insolvency in the bankruptcy sense or insufficiency of assets to meet liabilities, *but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part. United States* v. *Oklahoma, Beaston* v. *Farmers Bank, Conard* v. *Atlantic Ins. Co. and Bramwell* v. *United States F. & G. Co.*, all supra, "Authorities", A. We cannot stress this point too much.

We submit that even though insolvency in the bankruptcy sense has been found to exist in this case, still the conditions of the statute have not been met and the Government is not entitled to the benefits thereof. The satute does not extend priority where a debtor is insolvent under any and all circumstances but only where such insolvency is manifested by three classes

of cases; first, those in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment of his assets; second, those in which the estate and effects of an absconding, concealed or absent debtor are attached by a process of law; and third, those in which an act of bankruptcy is committed. In other words, these three cases or conditions appearing in the latter part of the priority act are not merely illustrations of the general insolvency spoken of, but are different limitations or manifestations of the situation under which the priority arises. *Beaston* v. *Farmers Bank, United States* v. *Oklahoma, Conard* v. *Atlantic Ins. Co., Bramwell* v. *United States F & G. Co.*, all supra, "Authorities", A.

Clearly the case at bar is not a case where the "estate and effects of an absconding, concealed or absent debtor are attached by process of law." It must fall within the two remaining situations to meet the requirements of the priority act.

It has been held that where a consent decree is entered in a general equity receivership of and for all the property of a debtor, or where the defendant admits the allegations and joins in the prayer for such a receivership, the proceeding is tantamount to a "voluntary assignment" within the meaning of the priority Act. *Price* v. *United States, People of the State of New York* v. *Mark Maclay, United States* v. *Butterworth-Judson Corp., Bramwell* v. *U. S. F. & G. Co., People of New York* v. *United States*, all supra, "Authorities" A (1). But in the case at bar no consent

decree definitely appears to have been entered and a second phase of the priority statute is eliminated. Even a consent decree in a case of debt and lien foreclosure, with limited receivership ancillary thereto, would not constitute a "voluntary assignment" within the meaning of such Act. (Cases infra).

It but remains to be determined if the particular receivership proceeding involved here is tantamount to an "act of bankrupcty"— the third and last phase of the priority Act to be considered. For this purpose reference is had to the National Bankruptcy Act, *11 USCA, Section 21*, as amended in 1926. The only conceivable act of bankruptcy which might be deemed applicable to the facts of the present case is subdivision (5) which provides that an act of bankruptcy by a person consists of his having "made a general assignment for the benefit of his creditors or while insolvent a receiver or trustee has been appointed or put in charge of his property."

To determine when such act of bankruptcy has been committed and the nature of the insolvency involved, we must refer to *Section 1, Subdivision 15, Title 11, USCA*, as it existed on the date of the receivership.

> "A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

We are not unaware of the many decisions holding that the appointment of receivers in certain cases and under certain conditions of insolvency, of and for the property of a defendant owing debts to the United States, is such an act of bankruptcy, under the above pertinent provisions of the Bankruptcy Act and the priority statute, as to give United States a preference. These are the decisions relied upon by th Government, but we suggest that such decisions can be easily distinguished from the case at bar when due consideration is given to the nature of the receivership involved in those cases and the receivership involved in the case before the court.

An examination of the petition or bill, the prayer for relief, the order of the court appointing the receiver in this case and the various interventions, in the light of the above quoted sections of the National Bankruptcy Act defining insolvency and acts of bankruptcy, impels to the conclusion that the receivership had in this case did not amount to an "act of bankruptcy" within the purview of these several Acts of Congress. We submit that the receivership had in the instant case is nothing more than a limited receivership, ancillary to and in assistance of a mere case of debt and foreclosure of lien and is not the general insolvency or equity receivership involving a liquidation of a debtor's assets for distribution among all ceditors. A close examination of the receiverships involved in those cases where the Government has been accorded a priority on the theory that same were "acts of bankruptcy" within the meaning of the priority statute, will reveal that such receiverships

belong to the latter class and did not involve a receivership merely in aid and assistance of debt and foreclosure of lien.

In *Standard Accident Insurance Company* v. *E. T. Sheftall & Co.*, supra, the Circuit Court of Appeals at New Orleans drew the distinction between the two kinds of receiverships, as related to an act of bankruptcy, in the following language:

> "In view of the general purpose of the Bankruptcy Act, we understand a general receivership to be referred to, and not one for specially described property, as in a mortgage foreclosure or an effort to enforce some other lien against specific property. The complainant in the bill under discussion did not seek to sequester in equity described property only but sought for and obtained a general receivership for all the property of the construction company wherever situated, thus withdrawing it from the claims of all common creditors except by intervention in the receivership. We have no doubt that this is such a receivership as was contemplated by the above quoted words of the statute. * * * "

We think it established beyond question that under the pertinent sections of the Bankruptcy Act, an act of bankruptcy is not committed, so as to make Section 3466, R.S. available, unless the receivership is a general insolvency or equity receivership as contradistinguished from the special or limited statutory receivership in this case. *Beaston* v. *Farmers Bank of Delaware*, *Standard Accident Ins. Co.* v. *E.*

T. Sheftall & Co., Elfast v. *Lamb, et al., Central Fibre Products Co., et al* v. *Hardin, in re Broadway Corp., affirmed, sub-nomine Duparquet* v. *Evans* all supra, "Authorities," A(2)

This court held outright in *Beason* v. *Farmers Bank*, supra, that the filing of a bill and the appointment of a receiver, the purpose of the suit being merely to collect a debt, do not amount to such a transfer of the property of the debtor as is contemplated by the then existing priority statute. Such statute contained the same three cases or limitations on the insolvency contemplated thereby as the present statute. And the instant case is solely to collect a debt and enforce a lien on specific property within the principle announced in this case.

RESTATEMENT OF SECOND COUNTER-PROPOSITION TO PROPOSITION OR QUESTION PRESENTED BY PETITIONER

(Submitted alternatively to First Counter-Proposition)

The motor fuel taxes claimed by the State of Texas, were, before the accrual of the right to priority of payment, if any, claimed by petitioner under Section 3466, R. S. (Title 31, U. S. C. A., Section 191), secured by a true, perfected and specific lien under Section 7, Article 7065a, Vernon's Texas Civil Statutes, upon the property involved in this receivership estate, rather than an inchoate, imperfect, and gen-

eral lien, and consequently such fixed lien cannot be impaired, affected or subordinated by petitioner's asserted right of priority under Section 3466, R. S. (31 U.S.C.A. 191).

STATEMENT, AUTHORITIES AND ARGUMENT UNDER SECOND COUNTER-PROPOSITION

Statement from the Record:

The receiver in this cause was appointed November 20, 1933, (R. 4) but it does not appear what time during the day such order was made, nor does it appear when the receiver qualified thereunder. The court fixed the date of November 25, 1933, for hearing on a contest of such appointment (R. 5).

The State intervened for motor fuel taxes, accruing for the months of October and November, 1933, as found by the trial court (R. 37).

Authorities

A. Nature of State's Lien.

1. Taxes not lien on property unless expressly made so.
   40 Tex. Jur. 202 (Taxation Sec. 145)
   State v. Hunt, 207 S. W. 636 (Judgment reversed on other grounds, Hunt v. State, 110 Tex. 204, 217 S. W. 1034)

2. Inherent power of State Legislature to impose occupation and other excise taxes and secure same by lien on the property, real or personal, used in or devoted to the business taxed.

   Article 8, Section 17, Constitution of Texas

   40 Tex. Jur. 205 (Taxation Sec. 146)

   Hodge v. Muscatine County, 196 U. S. 276, 49 L. Ed. 477

   State v. Jones, et al, 290 S. W. 244 reversed on other grounds (Com. App.) 5 S. W. (2d) 973

   In Re Brannon, 62 Fed. (2d) 959

   In Re Robertson, 20 Fed. Sup. 270

   Kirk v. City of Gorman, 283 S. W. 188 (Tex, Civ. App.)

3. Lien of State specific and perfected lien at time motor fuel taxes accrue and become payable and not inchoate or general lien to be ripened into true and perfected lien by levy, distraint, attachment or any other proceedings in or out of court.

   Section 7, Article 7065a, Vernon's Texas Civil Statutes

   28 Tex. Jur. 6 (Liens Sec. 2)

   In Re White Star Refining Co., 74 Fed. (2d) 269 (involves the instant lien statute) Cert. denied 294 U. S. 727, 79 L. Ed. 1257.

   Zorn v. Deberry, 4 Fed. Supp. 905 (involves instant lien statute)

   State of Texas v. Donoghue, 88 Fed. (2d) 48, 50, 51, rev. other grounds, 302 U. S. 284, 82 L. Ed. 264, (involves in part, instant lien statutes.)

Ernst v. Guarantee Millwork, Inc., et al, 93 P. (2d) 404, 408, 409, (comparable labor lien recognized over social security and income taxes.)
Regan v. Metropolitan Haulage Co., 127 N. J. Eq. 487, 14 A. (2d) 257 (comparable garage-keeper's lien.)
In Re Brannon, 62 Fed. (2d) 959
In Re Cardwell, 52 Fed. (2d) 158
Wright, et al v. State, 71 S. W. (2d) 352, (Tex. Civ. App.)
Johnston & Burnham, Inc., et al v. State, et al, 95 S. W. (2d) 144, (Tex. Civ. App.)
Ex Parte Klugsberg, 126 Tex. 225, 87 S. W. (2d) 465.

4. Article 7266, 7272, and 7275 of Chapter 8, Title 122, Vernon's Texas Civil Statutes, cited by petitioner as providing necessary procedure for converting inchoate motor fuel tax lien into a perfected lien against specific property, apply only to ad valorem taxes directly and annually assessed against property, or appearing upon the county tax rolls, rather than the excise taxes involved here, for which no assessment is required, and to secure which a specific constistutional and valid lien is given by Article 7065a, Section 7, Vernon's Texas Civil Statutes, independent of the liens securing ad valorem taxes, and the provisions for their enforcement.
State v. Wynne, 134 Tex. 455, 133 S. W. (2d) 951 (at pp. 957 & 961)

(a) Comptroller of Public Accounts

rather than county tax assessor-collector charged with collection of motor fuel tax.

Sections 2 (2d), 3, 4, 5, 6, 7, 8 of Article 7065a, Vernon's Texas Civil Statutes.

(b) The fixing of a lien to secure excise tax, on property either real or personal, devoted to or used in the occupation or business taxed, does not make such tax an ad valorem tax on such property.

20 R. C. L. 392 (Taxation Sec. 350)

State v. Jones, et al, 290 S. W. 244 (Tex. Civ. App.)

Hodge v. Muscatine County, 196 U. S. 276, 49 L. Ed. 477

Ex Parte Klugsberg, 126 Tex. 225, 87 S. W. (2d) 465

Wright, et al v. State, 71 S. W. (2d) 352, (Tex. Civ. App.)

Johnson & Burham, Inc., et al v. State, et al, 95 S. W. (2d) 144, (Tex. Civ. App.)

State, ex rel. Schwartz v. Ferris, 153 Ohio St. 1, 50 L. R. A. 219, 221.

Blackrock Copper Mining and Milling Company v. Tingey, 34 Utah 369, 98 Pac. 180, 28 L.R.A. (N.S.) 255.

(c) Definition and Nature of Assessment.

40 Tex. Jur. 129 (Taxation Sec. 91)

George v. Dean, 47 Tex. 73

State v. Farmer, 94 Tex. 232, 59 S. W. 541

Republic Insurance Company v. Highland Park Independent School Dis-

trict of Dallas County, 57 S. W. (2d) 627, (Tex. Civ. App.).

(d) Assessment not necessary for excise taxes.

Texas Banking & Insurance Company v. State, 42 Tex. 636.

State v. Bradley, 207 Ala. 677, 93 So. 595, 26 A. L. R. 421.

State v. Pioneer Oil & Refining Company, (Com. App.) 292 S. W. 869.

Libby, McNeill & Libby v. Stratton, 359 Ill. 398, 194 N. E. 572.

State ex rel. Mitchell v. National Life Insurance Company of the United States, 275 N. W. 26.

5. Time of accrual of motor fuel taxes and supporting lien.

61 C. J. 922 (Taxation, Sec. 1172) and cases cited.

In Re White Star Refining Co. 74 Fed. (2d) 269.

State v. Pioneer Oil & Refining Company, 292 S. W. 869, (Com. App.)

B. State's specific lien not divested or affected by mere priority afforded Government under Section 3466, R. S. (31 U. S. C.A. 191).

Thelusson v. Smith, 2 Wheat. 396, 425, 426, 4 L. Ed. 271, 278, 279.

United States v. Knott, 298 U. S. 544, 550, 551, 56 S. Ct. 902, 905, 80 L. Ed. 1321, 1326, 1327.

Beaston v. Farmers' Bank, 12 Pet. 102, 135, 136, 9 L. Ed. 1017, 1030.

Conard v. The Atlantic Ins. Co. of New York, 1 Pet. 386, 7 L. Ed. 189, 213.

Brent v. The Bank of Washington, 9 U. S. 594, 611, 612, 9 L. Ed. 547, 553, 554.
United States v. Nicholls, 4 Yeates 251.
Spokane County v. United States, 279 U. S. 80, 95, 73 L. Ed. 621, 625, 626, 49 S. Ct. 321.
New York v. Maclay, 288 U. S. 290, 77 L. Ed. 754, 53 S. Ct. 323.
Gerson, Beesley and Hampton v. Shubert Theatres Corp., 7 Fed. Supp. 399.
People of New York v. United States, 106 Fed. (2d) 210.
Ernst v. Guarantee Millwork, Inc., 93 P. (2d) 404, 408.
Regan v. Metropolitan Haulage Co., 127 N. J. Eq. 487, 14 A. (2d) 257.

Argument

Even though our first counter-proposition is found not to present a valid proposition of law, in that the type of receivership involved is sufficient to bring the instant case within the purview and meaning of the priority Act, (R. S. 3466) nevertheless, we earnestly contend that such right of priority is defeated and such Act of Congress is not effective to accord a priority, *because at the time of the appointment of the receiver in this case and the consequent priority contended for by the Government, the State of Texas had a true, specific and perfected statutory lien upon the refining properties of the debtor, and such lien could not, under the authorities cited, be divested, subordinated or destroyed by said priority statute.*

As adverted to hereinabove, we think it unquestioned law, admitted by petitioner, that Section 3466, R. S. (31, U. S. C. A. 191), does not provide or afford a lien of any kind. Moreover, we have found no respectable authority holding that a true and specific lien, existing at the time the insolvency contemplated by this Act occurred, would be destroyed or impaired; on the contrary, from the earliest decisions of this Court to the latest, it has been held that such Act will not overreach or supersede a transfer of property or divest a specific lien attached thereto prior to the occurrence of the conditions calling for the operation of this Act. See Authorities, B, supra.

Even the very decisions cited by the Government as being controlling upon the right of the United States to a preference in the payment of its taxes over taxes of a State or political subdivision, make it plain that such decisions do not turn upon a lien question, but merely upon a question of priority between debts or taxes owing to the respective sovereignties, which debts or taxes are not secured by *specific* and *perfected* liens.

To illustrate, in the case of *Spokane County* v. *United States*, supra, this Court limits and confines its decision to a consideration of the priority statute, independent of any question of lien enforcement, in the following language:

> "Assessments for Spokane County for $6,195.38, and of Whitman County for $410.36, were made in 1921 and 1922 before the receiver

was appointed. What is the effect of those claims against the fund in court? In Wilberg v. Yakima County, 132 Wash. 219, 231 p. 931, 41 A. L. R. 184, it is held that the amount of the tax is the personal obligation of the person who owned the property at the time of the assessment and that the tax is to be collected, if the property still continues in the hands of the person against whom it was assessed, from the property; if that specific property does not exist in such hands, the amount of the tax may be collected as a lien upon all the real and personal property of the person assessed and may be collected from the other personal or real property of such person by seizure, distraint, or other specific proceedings. It would seem to follow that a lien for these particular taxes could not interfere with the priority of the United States, *for there is nothing in this record to show that distraint by the sheriff or any of the necessary procedure mentioned in the statute followed.*

" * * *

"(4) *From the judgment in the majority of the Supreme Court of Washington in this case, we must infer that the liens of the two counties for the taxes levied before the receiver was appointed and not collected were not specific. This is really a state question.* It is explained by the concurring opinion of Judge Parker, as follows:

" 'I concur in the result reached in the foregoing majority opinion solely upon the ground that this tax debt due to the United States, viewed apart from any supporting lien right, has priority over this tax debt due the State of Washington, viewed apart from any supporting lien right. It seems clear to me that each of these two tax

debts primarily came into existence by the levy of a tax in personam, and not by the levy of a tax in rem. I think a critical reading of the revenue legislation of the respective sovereignties, the United States and the state, and the record in this case showing the manner of the levying of these respective taxes, will render this plain. *The revenue legislation of each has prescribed procedure by which its personam tax debts may be made specific liens upon property of one personally owing such tax debt.* This record, I think warrants the conclusion that neither the United States, the State of Washington, nor Spokane County for the State of Washington, has ever, by the prescribed statutory procedure, perfected its inchoate tax lien right against any of the property of which the funds here in question are the proceeds. I, therefore, view these respective tax debts wholly apart from any supporting lien right. Thus I think the question of which 'shall be first satisfied' out of these funds is determinable by the language of section 3466, . . . quoted in the majority opinion, and hence must be determinable in favor of the United States.'

"Whatever might have been the effect of more completed procedure in the perfecting of the liens under the law of the state, upon the priority of the United States herein, the attitude of the state court relieves us of consideration of it." (Italics supplied)

In *New York* v. *Maclay*, supra, cited by petition in its brief as controlling here, the Court, although holding that the lien asserted by the State in that case was inchoate and imperfect rather than a specific lien at

the time the rights of the Government to priority accrued and, therefore, would not defeat such priority, emphasized the fact that a different decision might have been necessary had the lien of the state been of a different nature.

In *United States* v. *Knott*, supra, this Court, in discussing the nature of the competing Florida claim, observed: "Such an interest lacks the characteristics of a specific perfected lien which alone bars the priority of the United States."

Under this Counter-Proposition, we concede that petitioner, United States of America, is entitled to prior payment out of the proceeds of this receivership estate, *unless the State had a true, perfect and specific lien upon the properties involved to secure its tax claim at or prior to the date of the instant receivership.* In other words, if the nature of the proceeding is sufficient to invoke the priority statute relied upon by the Government, and the State does not have such a vested and specific lien prior to receivership, then, considered purely on the basis of tax claims unsupported by any liens, the Government is clearly entitled to priority under these decisions. But that is just as far as the decisions go, and this Court has expressly declared that the preference statute does not avail if a specific and perfected lien existed on the property prior to the conditions giving rise to such statute.

It thus appears that the question resolves itself into whether or not the lien, asserted by the State of

Texas in the case at bar, was specific and perfected before a right of priority under *Section 3466*, R. S. accrued, if it does so accrue as contended by the Government.

For the convenience of the Court we copy the pertinent portion of said lien statute, Article 7065a-7, Vernon's Texas Civil Statutes:

> "All taxes, fines, penalties and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, stocks on hand of every kind and character whatsoever used or usable in such business, including crude oil or other materials for the manufacture, refining, blending or compounding of motor fuels and the refined products therefrom and the proceeds from the sale of such materials and refined products, and any other property of every kind and character whatsoever and wheresoever situated devoted to such use and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business."

An examination of the foregoing lien statute impels to the conclusion that such lien accrued prior to the receivership in this case and any possible right of

priority, and was not a mere inchoate or imperfect lien, such as was involved in the cases next hereinabove discussed. In those cases it was, under the applicable lien statute, necessary for the property to be seized under a warrant of distraint issuing from the tax authorities of the particular state, or for some other procedure to be taken, in or out of court, in order to convert an inchoate lien into a true and perfect one. But under the lien statute of this State, no proceedings by warrant of distraint or otherwise are provided or made necessary to the creation of a perfected and specific lien, but such lien is made to accrue or arise at the time a liability for taxes accrues, and remains a fixed charge on the property from that time on. In other words, the tax levy for which the State of Texas asserts its claim is in *rem* and not the mere levy of a tax in *personam*. The tax is secured at the time of accrual by a fixed charge or lien upon the property described in the Act, and is not a mere personal obligation which could be ripened into a lien by certain statutory procedure.

Ballentines Law Dictionary, according to *Texas Jurisprudence*, supra, defines and distinguishes special liens and general liens as follows:

> "With respect to their nature, liens are classified as general and special. A special lien is one upon a particular property. If a lien extends to everything acquired and to be acquired, it is not special but general."

Unlike the lien statutes of the taxing sovereign-

ties involved in the cases upon which petitioner stands, the above lien statute fixes and confines such lien to specific property, i. e., only the property which is used in the business of manufacturing and distributing motor fuel in Texas, such as refinery, blending plants, storage tanks, etc. The Texas lien does not, as such other tax liens, including the Government's, extend to "all property or rights to property, whether real or personal," etc., belonging to the taxpayer, but only rests upon and is a charge upon the property used in the taxed business. The distributor might have all kinds of property, both real and personal, and if the State's lien had been a broad general lien upon all such property, it would be necessary for some steps to be taken by levy, distraint, etc. to convert such general lien into a specific lien. But for the lien resting upon particularly described and specific property no such procedure is necessary and no such procedure has been provided or required by the Legislature of Texas, contrary to the assertion of petitioner in its brief that we have not followed the procedure required to perfect our lien, under the entirely inapplicable provisions of Articles 7266, 7272, and 7275, Vernon's Texas Civil Statutes.

We think the case of *In Re White Star Refining Company*, supra, "Authorities," A(3), is directly in point upon this question. In discussing this very lien statute, the court said:

> "The taxes here involved are given a lien by these statutory words: 'All taxes, fines, penalties and interest due by any distributor to the State

> shall be a preferred lien . . . upon all of the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles or any other property devoted to such use, and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business.' Article 7065a-7, Vernon's Annotated Civil Statutes. *The lien probably arises as the taxes accrue.* See 61 C. J., Taxation, 1172, 1173, and cases cited. *It does not depend on insolvency or any court action. The tax is a claim secured by the described property.*" (Italics ours).

The cases of *Zorn* v. *Deberry* and *State of Texas* v. *Donoghue*, both supra, "Authorities," A(3) holds inferentially, if not directly, that the motor fuel tax lien of the State of Texas is a specific lien upon certain properties and is not a lien acquired through court action or other necessary steps. These cases turn upon the very lien statute under consideration here and determine that same is a lien such as, under Title 11, U.S.C.A., Section 107 (d), would not be affected by bankruptcy and is not a lien brought within the purview and meaning of Title 11, U.S.C.A., Section 107(f), to the effect that "all levies, judgments, attachments or other liens obtained through legal proceedings * * * shall be invalidated by adjudication of bankruptcy." In the Donoghue case, the motor fuel tax lien foreclosure suit yielded to reorganization proceedings because a receiver was not appointed in State court until after reorganization

proceedings, rather than because the tax lien was not specific and perfected (p. 51 of opinion).

We submit that these cases are in point because the Government asserts that the statutory tax lien of the State is inchoate and must be perfected by levy, seizure and sale under Articles 7266, 7272, and 7275, Vernon's Texas Civil Statutes, and these decisions hold that it is not a lien which is perfected by attachment, levy, etc., but a true lien which is not affected by bankruptcy.

Turning upon the same sections of the Bankruptcy Act, the cases of *In Re Cardwell* and *In Re Brannon*, both supra, "Authorities," A(3), held that under Article 5238, Vernon's Texas Civil Statutes, a landlord has a lien on all property of the tenant on the rented premises, and no record or other action is necessary to perfect it for arrears not exceeding six months, and therefore, was such a statutory lien as was in existence prior to bankruptcy, and, not being dependent upon a levy of any character for its inception, would not be defeated or affected by bankruptcy. We invite a comparison of the landlord statute to the tax statute involved here and say, with stronger reasoning, that if the first is a specific and perfected lien, certainly the latter would be.

In the cases of *Wright, et al* v. *State* and *Johnson & Burham, Inc., et al* v. *State, et al*, both supra, "Authorities" A(3), the courts held that the statutory tax lien involved here was and became a lien upon certain described property, upon a delinquency of mo-

tor fuel taxes, and it was not shown that any steps were taken, by levy, attachment or otherwise to fix such liens, and the court did not feel constrained to hold that such steps were necessary.

In *Ex Parte Klugsberg*, supra, "Authorities," A (3), the statutory lien given to secure cigarette taxes due the State of Texas, identical in tenor and application to this lien, was upheld without any indication that certain steps were provided by statute for perfecting and accruing such lien.

The Government relies heavily upon the failure of the State to comply with the provisions of Articles 7266, 7272, and 7275, of Chapter 8, Title 122, Vernon's Texas Civil Statutes, for the purpose of converting its alleged inchoate motor fuel tax lien into such a perfected lien against specific property, as is necessary, under the decisions, to defeat the asserted priority of the United States. We earnestly submit that the cited Articles have nothing whatsoever to do with this case. Such statutory provisions relate solely to the duties of the Assessor-Collector of Taxes for the various counties of the State, in the collection of ad valorem taxes due and owing to the State and its various political subdivisions and do not expressly, or by necessary implication, relate to the collection of the excise tax levied by Article 7065a, Vernon's Texas Civil Statutes, upon the sale or use of motor fuel in Texas. The latter Act expressly charges the Comptroller of Public Accounts of the State of Texas with the general administration of the Motor Fuel Tax Law and the collection of the taxes levied there-

by. In this connection, Section 2(d) provides, in part, as follows:

> "Every distributor making first sale of motor fuel shall pay to the State of Texas an occupation or excise tax equal to four (4) cents per gallon or fractional part thereof, so sold, distributed or used, and such tax shall be due and payable at the office of the Comptroller at Austin, Texas, on the 20th day of each month, the same to be based on such sales or use made during the calendar month next preceding, and at the same time, such distributor shall make and deliver to the Comptroller a report properly sworn to and executed by such distributor or his representative in charge, on such forms as the Comptroller shall prescribe, which, among other things, shall give the number of gallons of motor fuel sold, distributed or used, intrastate and interstate, and exported during the preceding calendar month, and the number of gallons of motor fuel used, distributed or lost by fire or otherwise upon which no tax is paid."

Sections 3-6 of said Act provide for the licensing and bonding of a distributor of motor fuel by the Comptroller of Public Accounts and the forfeiture by him of the permit issued for failure to comply with the law.

Section 7 of said Act, which affords the State the lien herein asserted, provides, in part, as follows:

> "If any distributor shall fail to remit proper taxes due, the Comptroller may employ audi-

tors or other persons to ascertain the correct amount due, and if such taxes have not been properly remitted, the distributor shall pay the reasonable expenses incurred in such investigation and audit as additional penalty. Provided however, that all funds paid to the auditors of the Comptroller as expenses incurred in making audits, shall be placed in a special fund in the State Treasury, which shall be used until exhausted for making other audits, and said sums are hereby appropriated for that purpose. Provided, that nothing herein shall prevent the Comptroller, when said fund is exhausted, from using other funds available for that purpose."

Section 8 of the Act requires every distributor of motor fuel in Texas to keep for a period of two years certain records for the inspection of the Comptroller and the Attorney General, and gives the Comptroller or his authorized representatives the authority to examine such records for the purpose of determining the tax liability of such distributors.

Subdivisions (d) and (e) of said Section 8 provide as follows:

"(d) If any distributor fails or refuses to pay any tax, penalties or interest within the time and manner provided by this Act, and it becomes necessary to bring suit or to intervene in any manner for the establishment or collection of said claim, in any judicial proceedings, any report filed in the office of the Comptroller by such distributor or his representative, or a certified copy thereof certified to by the Comptroller or Chief Clerk, showing the amount of motor fuel sold by

such distributor or his representative, on which such tax, penalties or interest have not been paid, or any audit made by the Comptroller or his representative from the books of said distributor, when signed and sworn to by such representative as being made from the records of said distributor or person from whom such distributor has bought, received or delivered motor fuel whether from a transportation company or otherwise, such report or audit shall be admissible in evidence in such proceedings, and shall be prima facie evidence of the contents thereof; provided, however, that the incorrectness of said report or audit may be shown.

"(e) In the event the Attorney General shall file suit or claim for taxes and attach or file as an exhibit any report or audit of said distributor, and an affidavit made by the Comptroller or his representative that the taxes shown to be due by said report or audit are past due and unpaid, that all payments and credits have been allowed, then, unless the party resisting the same shall file an answer in the same form and manner as required by Article 3736, Revised Civil Statutes of Texas, of 1925, as amended by Chapter 239, Acts of the Regular Session of the Forty-second Legislature, said auditor or report shall be taken as prima facie evidence thereof, and the proceedings of said Article are hereby made applicable to suits to collect taxes hereunder."

It is apparent from the foregoing pertinent provisions of the Motor Fuel Tax Law that the excise taxes levied thereby do not arise by virtue of any annual *levy* by the Commissioners' Court of the county

or annual *assessment* by the Assessor-Collector of the county, charged under the Constitution and statutes of Texas with the collection of ad valorem and certain other taxes. The Legislature, itself, by the enactment of the Motor Fuel Tax Law, has made a levy of 4c for each gallon of motor fuel sold, used or distributed in the State; and no assessment of this tax is contemplated or required because the tax is established by the return of the taxpayer or distributor on the 20th day of the month succeeding the month during which the motor fuel was sold or used, or, absent such voluntary return, by the duly made and certified audit of the Comptroller of Public Accounts. The amount of such motor fuel tax is computed entirely on the volume of business done, on a gallonage basis, for a given period rather than upon the valuation of the physical properties, real and personal, owned by the taxpayer on the first day of January of the tax year. An *assessment* is not necessary for the accrual of an excise tax or its supporting lien. We refer to the authorities cited under this Counter-Proposition ("Authorities," A-4)

We make this apparently simple point because Articles 7266, 7272, and 7275 of Chapter 8, Title 122, Vernon's Texas Civil Statutes, relied upon so strongly by petitioner as applicable and necessary to the proper fixing of the State's motor fuel tax lien, comprehend merely taxes annually levied and assessed or appearing upon the county tax rolls, and which, being unsecured by any specific constitutional or statutory lien against any particular property, depend upon the statutory seizure and levy by the col-

lector for the creation of a lien. This is apparent from the following provisions of Article 7266:

> "If any person shall fail or refuse to pay the taxes imposed upon him or his property by law, until the first day of January next succeeding the return of the *assessment roll* of the county to the Comptroller, the *tax collector shall, by virtue of his tax roll*, seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with all costs accruing thereon; provided, there shall be no levy on property when the owner thereof has the right to pay at the Comptroller's office, until a list of the persons who have paid their taxes at said office has been furnished the tax collector by the Comptroller. The Comptroller shall forward said list of paid taxes on or before the first day of February of each year; and the tax collector shall, immediately on receipt of said list from the Comptroller, levy on and sell the property of such non-residents as have not paid their taxes, in accordance with the law regulating the sale of property for taxes." (Italics ours)

It will be noted that the taxes which the Collector is authorized and required to collect by levy and seizure of personal property are such taxes as appear on the "assessment roll" of the county, and it is under the authority of such "tax roll" that said official proceeds to act. Moreover, the caption of the Act, of which said Article is a part, (Acts 1887, p. 127; General Laws of Texas, Vol. 9, p. 128), recites its purpose to be "to provide for a more thorough and efficient assessment of property and the collection of taxes

thereon." This clearly indicates the legislative intent to embrace within the purview of said Articles direct ad valorem taxes on property rather than excise taxes on the sale or use of commodities, including motor fuel.

The same may be said of Articles 7272 and 7275 of Chapter 8, Title 122, Vernon's Texas Civil Statutes, quoted by petitioner in appendix to its brief, as a mere reading of these statutes impels to the conclusion that the levy, seizure and sale by the tax collector, required and authorized thereby, is for the collection of poll taxes and direct ad valorem taxes on real and personal properties, subject to assessment, but which taxes are unsecured by liens on specific property. As pointed out above, the Legislature of Texas has provided an entirely different statutory set-up for the collection of delinquent motor fuel taxes. The statutory lien given by Section 7 of said Act (Article 7065a, Vernon's Texas Civil Statutes), upon specific property, arises as the tax liability accrues, and no assessment, seizure, levy, etc., is required under such system, either by the language of the pertinent provisions of said Act, or the cases hereinabove discussed.

We respectfully submit that our statutory motor fuel tax lien is radically different from the tax liens involved in the cases upholding the priority of taxes due the United States over those due a state or its taxing subdivisions. In *Spokane County* v. *United States*, supra, the county's lien was described by the court as follows:

"Assessments for Spokane County for $6,195.38, and of Whitman County for $410.36, were made in 1921, and 1922 before the receiver was appointed. What is the effect of those claims against the fund in court? In Wilberg v. Yakima County, 132 Wash. 219, 231 p. 931, 41 A. L. R. 184, it is held that the amount of the tax is the personal obligation of the person who owned the property at the time of the assessment and that the tax is to be collected, if the property still continues in the hands of the person against whom it was assessed, from the property; if that specific property does not exist in such hands, the amount of the tax may be collected as a lien upon all of the real and personal property of the person assessed, and may be collected from the other personal or real property of such person by seizure, distraint, or other specific proceedings. It would seem to follow that a lien for these particular taxes could not interfere with the priority of the United States, for there is nothing in this record to show that distraint by the sheriff or any of the necessary procedure mentioned in the statute followed.

"From the judgment of the majority of the Supreme Court of Washington in this case, we must infer that the liens of the two counties for the taxes levied before the receiver was appointed and not collected were not specific. This is really a state question."

In *New York* v. *Maclay*, supra, the State of New York was asserting a claim for franchise taxes due the years 1921 to 1925, *but not assessed or liquidated until after the receivership* in 1927. The court held

that the liability being unliquidated and unknown, the lien securing same was not perfect and specific.

In *Gerson, Beasley and Hampton, Inc.* v. *Shubert Theatre Corporation*, supra, the tax lien involved was held not to have become specific before receivership, because the statutory procedure was not followed. The court, in passing, held that both the lien of the United States contended for in that case, as well as the lien of the State, was inchoate:

> "That the liens on the corporation's assets given to the United States by section 3186 of the Revised Statutes and to the state by section 219-c of the Tax Law were inchoate or general only, and not perfected or specific, is manifest from mere reading of the statutes themselves. So far as I have discovered, the sole method prescribed by the law of New York for making a lien specific, in a case like that under consideration, is for the sheriff of a county where corporate property is located to levy on it a warrant issued by the State Tax Commission. This is true by force of section 219-e of the Tax Law, which provides that the warrant is a lien upon the property levied on by the sheriff from the time of an actual levy. Here the exclusive method for rendering the state's lien specific was never resorted to. Not alone was there never an actual levy, but not even a warrant directing a levy was ever issued. In consequence, the state did not preceding October 20, 1931, or at any time acquire a specific lien.
>
> "The lien of the state never having become specific and insolvency of the corporation having

occurred, it follows, as I see it, that the United States is entitled to priority for its 1926 taxes over the state of New York for its 1928 taxes. Settle order on two days' notice."

In *Re Lincoln Chair and Novelty Company*, 9 N. E. (2d) 7, the court held that although the franchise taxes claimed by the State had been assessed and liquidated, that nevertheless *no specific property having been seized or appropriated to the satisfaction of the debt or set apart from the general property of the debtor, such statutory tax lien was like the lien of a* judgment which is not specific but merely gives to the creditor the right to payment out of the property *after the property or a part thereof is appropriated and set apart for that purpose.*

For the same reason we think the case of *Thelusson* v. *Smith*, supra, "Authorities," B, relied upon by the Government, is not in point because it involves a general judgment lien of a state.

We could similarly discuss all of the cases which are cited by the Government as defeating the State's lien, but suffice to say that under our tax lien no setting apart or appropriation of specific property from the general mass of property of the taxpayer, by seizure or levy, is necessary, for the statute itself fixes and designates the property under lien. It therefore appears that it does not in any way resemble a judgment lien or other inchoate tax lien such as involved in the cases relied upon by petitioner.

It is plain that this true and specific lien relied up-

on by the State arises at the time the tax accrues and liability for its payment commences. The statute does not fix a different time, and in such case this appears to be the proper accrual date. *61 C. J. 922 (Taxation Section 1172); In Re White Star Refining Company*, supra.

It must next be determined when the liability for motor fuel taxes accrues. We think this question is settled by the case of *State* v. *Pioneer Oil and Refining Company*, supra, holding that such taxes for the month of April, 1923, became due and constituted a liability to the State on May 25, 1923. Under that statute the time fixed for the monthly report and remittances was the 25th of the month for the preceding month. Under the present statute such date is fixed on the 20th of the month.

In concluding this brief, we strenuously dispute the contention of petitioner that "if there were no mortgage creditor in this case, and if the controversy were merely as between the United States and Texas, it is clear that Section 3466 would require priority to be accorded to the claims of the United States," (petitioner's brief, p. 9) and that the decision under review here was prompted by the so-called "dilemma" which the lower courts of this State faced with the presence of said mortgage creditor, as more fully pointed out on pages 6 and 11 of petitioner's brief, to which we respectfully refer the Court. The priority which the Government recognizes in the chattel mortgagee here, and which is supposed to provoke this "dilemma," is expressly given by Section 3186, Re-

vised Statutes (26 U.S.C.A. 1560-62), the lien statute, rather than by Section 3466, Revised Statutes (31 U.S.C.A. 191), the priority statute. This fact and the solution or formula proposed by the Government is clearly set forth at page 91 of the decision in *Spokane Co.* v. *United States*, supra, cited by petitioner in this connection.

On page 8 of petitioner's brief it is stated that "this case arises under Section 3466 rather than under Section 3186." If the issues raised by this review are thus limited (and we have been so governed in preparing this answering brief), then it follows that the "dilemma" and its solution proposed by the Government in the Spokane County case is not applicable to the case at bar. The issue squarely before this Court is whether or not said priority statute, Section 3466, gives the United States a preferential payment of its tax claim, *unsupported by any lien*, over the tax claim of the State of Texas, which we contend is supported by a specific and perfected lien prior to the accrual of such priority. If the Government's tax claim yields to the chattel mortgage creditor, under this Act, (Section 3466), it is by virtue of the decisions cited herein, holding that a mere priority statute will not divest or defeat an existing valid lien, rather than the provisions of the lien statute (Section 3186, Revised Statutes) expressly recognizing the preferential status of such mortgage lien over the Government's lien. On this appeal the Government has abandoned the lien it asserted in the lower courts and hence the "dilemma" arising therefrom, if any ever existed, goes out of the case.

We therefore urge a full decision by this Court upon this issue, placed squarely before it by the record, and suggest that the formula urged upon this Court by petitioner will not fully and satisfactorily adjudicate the ever-recurring conflict between the two taxing sovereignties present here, to the prejudice and confusion of their respective tax-collecting officials. We submit that such formula is specious but not sound or based upon fundamental legal principles; because the setting aside from the funds in court of a sufficient amount to pay the mortgage creditor and then allowing therefrom the State of Texas a prior satisfaction of its lien pro tanto, would place the State in the position of an unsecured creditor with reference to the balance of its debt and lien and would not properly determine the priority of the State's lien statute over the Government's priority statute, a question directly raised by this appeal and the State's brief.

WHEREFORE, the State of Texas prays that the judgment of the Court below be in all things affirmed.

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Assistant Attorney General

The attorneys for Petitioner are: Charles Fahy, Acting Solicitor General; Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key, Arnold Raum, J. Louis Monarch, Clarence E. Dawson, Special Assistants to the Attorney General.

A copy of this brief has been delivered to each of said attorneys.

p. 3+5

SUPREME COURT OF THE UNITED STATES.

No. 44.—October Term, 1941.

The United States of America, Petitioner, *vs.* The State of Texas, et al., Respondents.	On Writ of Certiorari to the Court of Civil Appeals, Second Judicial District, State of Texas.

[December 22, 1941.]

Mr. Justice Byrnes delivered the opinion of the Court.

W. L. Nix was a manufacturer and distributor of motor fuel, doing business in Texas under the name of Texas Refinery. On November 20, 1933, M. R. Ingraham, who held a demand note secured by a chattel mortgage on certain tanks belonging to Nix, brought an action in the District Court of Gregg County, Texas. He alleged that demand had been made on the note, that it had not been paid, that Nix owned no property in Texas other than that of Texas Refinery, that the value of the mortgaged tanks was insufficient to discharge the note, that the tanks were not used "for a separate purpose" but in the "operation of the said refinery as a unit," and that Nix was insolvent. He asked that judgment be entered in his favor for the amount of the note, that the mortgage be foreclosed, and that in the meantime a receiver be placed in charge of "the whole of the property" of Texas Refinery. On the same day a receiver was appointed, and he was subsequently authorized to sell all of the refinery property.

On November 21, R. P. Ash intervened in the proceedings as the holder of an overdue note secured by a mortgage on the physical plant of the refinery not subject to the Ingraham mortgage. Both the state of Texas and the United States then intervened with the claims for state and federal gasoline taxes which are the subject of the present dispute. Later both the Ingraham and Ash mortgage notes were assigned to Howard Dailey.

The District Court found that Nix was insolvent on November 20, 1933, and continued to be insolvent thereafter. The sum available

for distribution after sale of the refinery property by the receiver was $7466.92. The court found that of these proceeds $1294.80 was allocable to those assets which were subject to the mortgages held by Dailey, and it ordered that his claim to that amount be first satisfied. It determined that Nix was liable to the United States for $19,343.91 in federal gasoline taxes, and to Texas for $40,312.51 in state gasoline taxes. As between the state and federal claims, it decided that the United States was entitled to priority and concluded that nothing would be left to apply to the Texas claim.

From this order Texas appealed to the Court of Civil Appeals for the Second District. That court certified the controlling questions to the Supreme Court of Texas. The Supreme Court, on the authority of *State* v. *Wynne*, 134 Tex. 455, a companion case decided the same day, answered the questions in such a way as to require that the claim of Texas be first satisfied, that of Dailey second, and that of the United States third. The Court of Civil Appeals thereupon so ruled, noting that the assets available would not completely satisfy even the claim of Texas and that Dailey and the United States would receive nothing. A motion by the United States for a rehearing was denied, and the Supreme Court of Texas refused to review the decision of the Court of Civil Appeals. We granted the petition of the United States for certiorari because of the important question of the fiscal relationship between state and federal governments which is involved.

No question as to the rights of Dailey, the mortgagee, is raised by this appeal. We confine ourselves, therefore, to the only question presently open to decision: the relative priority of the claims of the United States and Texas.

The United States rests its assertion of priority upon § 3466 of the Revised Statutes.[1] Despite the contention of Texas to the contrary, that section clearly applies to this proceeding. As we recently remarked in *United States* v. *Emory*,[2] § 3466 covers in terms the case of an insolvent debtor who has committed

[1] U. S. Rev. Stat. § 3466 (U. S. C., Title 31, Section 191) provides: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

[2] No. 33, Oct. Term 1941.

an act of bankruptcy, and there are few more familiar examples of an act of bankruptcy than the appointment of a receiver because of the debtor's insolvency. *Cf.* § 3(a)(4) of the Bankruptcy Act, U. S. C., Title 11, § 21(a)(4). Here the district court expressly found that Nix was insolvent, and it appointed a receiver. It is true that the original petition was filed by a mortgagee rather than by a general creditor. But if any limitations upon the operation of § 3466 might otherwise have flowed from this circumstance they were removed by the subsequent character of the proceeding. The receiver was placed in control of all of Nix's assets, rather than only those subject to the mortgage, and all of the assets were eventually liquidated. Parties other than the mortgagee, including Texas itself, intervened and were heard. We think that realities require us to treat the proceeding as a general equity receivership within the scope of § 3466.

We are thus brought to the important issue in the case. Article 7065a-7 of the Texas Civil Statutes declared that all gasoline taxes due by any distributor to the state "shall be a preferred lien, first and prior to any and all other existing liens, upon all the property of any distributor, devoted to or used in his business as a distributor . . . ."[3] It is the state's position that under this section it held a specific and perfected lien upon the refinery property which entitled it to priority despite § 3466 of the Revised Statutes.

Section 3466 mentions no exception to its requirement that "the debts due to the United States shall be first satisfied." It is nevertheless true that in several early decisions this Court read an exception into the section in the case of previously executed mortgages. *Thelusson* v. *Smith*, 2 Wheat. 396, 426; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611, 612. This doctrine seems to have been based on the theory that mortgaged property passes to the mortgagee and is no

[3] The full text of the paragraph, as of Nov. 20, 1933, when the receiver was appointed read: "All taxes, fines, penalties and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, upon all the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, or any other property devoted to such use, and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business." This section was repealed on May 1, 1941 by Article XVII, § 28 of the Acts of the 47th Legislature, and simultaneously replaced without significant change by a new Article 7065b-8.

longer a part of the estate of the mortgagor. See *Conard* v. *Atlantic Insurance Co., supra*, at 441-442. The question of whether the priority of the United States under § 3466 would also be defeated by a specific and perfected lien upon property whose title remained in the debtor was reserved in those cases. *Ibid; Brent* v. *Bank of Washington, supra*, at 611-612. However, it was determined that a general judgment lien upon the lands of an insolvent debtor does not take precedence over claims of the United States unless execution of the judgment has proceeded far enough to take the land out of the possession of the debtor. *Thelusson* v. *Smith, supra*, at 425-426.

In more recent years the Court has had occasion to consider the argument that liens created in favor of states or counties by state statutes entitled them to priority over the United States under § 3466. In *Spokane County* v. *United States*, 279 U. S. 80, the priority of the United States was upheld. The state statutes involved provided that if a certain personal property tax was not paid, and if the personal property against which it had been assessed was no longer in the hands of the delinquent taxpayer, the amount of the unpaid tax should become a lien upon all the real and personal property of the taxpayer. They went on to prescribe the procedure by which the lien was to be enforced. The Court determined that the statutory lien did not become specific until this procedure had been followed. Since these procedural conditions had not been satisfied in the case before it, the Court refused priority to the tax claims of the county. It specifically declined to consider what "the effect of more completed procedure in the perfecting of the liens under the law of the State" would have been. 279 U. S. at 95.

The New York statute in *New York* v. *Maclay*, 288 U. S. 290, declared that the corporate franchise tax there involved should "be a lien and binding upon the real and personal property of the corporation . . . until the same is paid in full." 288 U. S. at 292. Although the franchise taxes in question were overdue, the state had taken no steps to perfect and liquidate its lien at the time the receiver was appointed for the insolvent corporation. Under such circumstances, the Court was of the opinion that the tax claim of the state did not deprive the claim of the United States of its priority under § 3466. It was at pains to make clear, however, that it intended by its decision to lend no support to the assumption that the doctrine of the mortgage cases, whatever its current vitality,

would require the subordination of unsecured claims of the United States to a specific and perfected lien. 288 U. S. at 293-294.[4]

We think that it is equally unnecessary to test that assumption here. Prior to the appointment of the receiver on November 20, 1933, the state of Texas had made no move to assert the lien proclaimed in Article 7065a-7. And the priority which attached to the claim of the United States on that day (*United States* v. *Oklahoma*, 261 U. S. 253, 260) could not be divested by any subsequent proceedings in connection with the state's lien. *New York* v. *Maclay*, *supra*, at 293.

It is urged, however, that Article 7065a-7 by its own force creates a specific and perfected lien. Support for this contention is said to lie in the fact that the statutory lien purports to affect only the property of the distributor which is "devoted to or used in his business as a distributor" rather than his property in general. This is thought to make the lien sufficiently specific. Moreover, the State argues, and the Supreme Court of Texas has declared,[5] that the provisions of the Texas Civil Statutes which govern the levy, seizure and sale of the property of delinquent taxpayers generally[6] are inapplicable to the gasoline tax. We are of course bound by this authoritative construction of the statute.

With respect to this contention it may first be said that the "property devoted to or used in his business as a distributor" is neither specific nor constant. But a more important consideration is that the amount of the claim secured by the lien is unliquidated and uncertain. As we said in *New York* v. *Maclay*: "If the state were to . . . omit to ascertain the debt, it would never be able to sell anything, for it would not know how much to sell." 288 U. S. at 293. That the legislature of Texas recognized this is revealed by another section of the statute. Article 7065a-8(d) declared that in the event of default, when it might become necessary for the state "to bring suit or to intervene . . . for the establishment or collection" of its claims in judicial proceedings,

[4] In United States v. Oklahoma, 261 U. S. 253, the question was not reached because it was found that the "insolvency" upon which the operation of § 3466 is conditioned was absent. The Court sustained the priority of the United States under § 3466 in United States v. Knott, 298 U. S. 544. The Florida statutes there involved required foreign surety corporations to deposit certain bonds with the State Treasurer for the protection of Florida residents. This arrangement was held to create no more than "an inchoate general lien" for the benefit of unknown persons who might become entitled to the fund, and not to limit the effect of § 3466.

[5] State v. Wynne, 134 Tex. 455, at 473

[6] See, esp., Articles 7266, 7272, and 7275 of the Texas Civil Statutes.

the tax reports required of the distributor by other provisions of the statute[7] should be "prima facie evidence of the contents thereof," but "the incorrectness of said report or audit may be shown." Thus it was clearly envisaged that the amount of the taxes due, for which the lien was security, should be left to determination by the courts.

As to the nature of the proper procedure for levy, seizure, and sale, it is enough to say that some procedure is essential. As we have indicated, the statutory scheme reveals that the legislature contemplated resort to the courts. In addition to the statutory provisions referred to above, Article 7065a-8(e) regulates the pleadings in suits by the Attorney General to collect the tax, and Article 7065a-9 determines the venue of such suits. Consequently, while it was clearly intended by Article 7065a-7 to create a lien in favor of the state, we must conclude that of necessity it was nothing more than an inchoate and general lien. Certainly it did not of its own force divest the taxpayer of either title or possession. It could not become specific until the exact amount of the taxes due had been determined, and it could not be enforced without the assistance of the courts. Like the tax lien in *New York* v. *Maclay*, *supra*, it served "merely as a *caveat* of a more perfect lien to come." 288 U. S. at 294.

We are not now called upon to decide whether the chattel mortgages held by Dailey are entitled to priority over the claim of the United States.[8] We hold only that the tax claim of the United States is entitled to priority over the tax claim of Texas. The case is remanded to the Court of Civil Appeals for proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[7] Article 7065a, Sections 2(b), 2(d), 8(a), and 8(b).

[8] The texts of the mortgages are not contained in the record; and Dailey did not appear in this Court.